Form No. 7 B & P S CO

San Francisco Law Library

No.______________

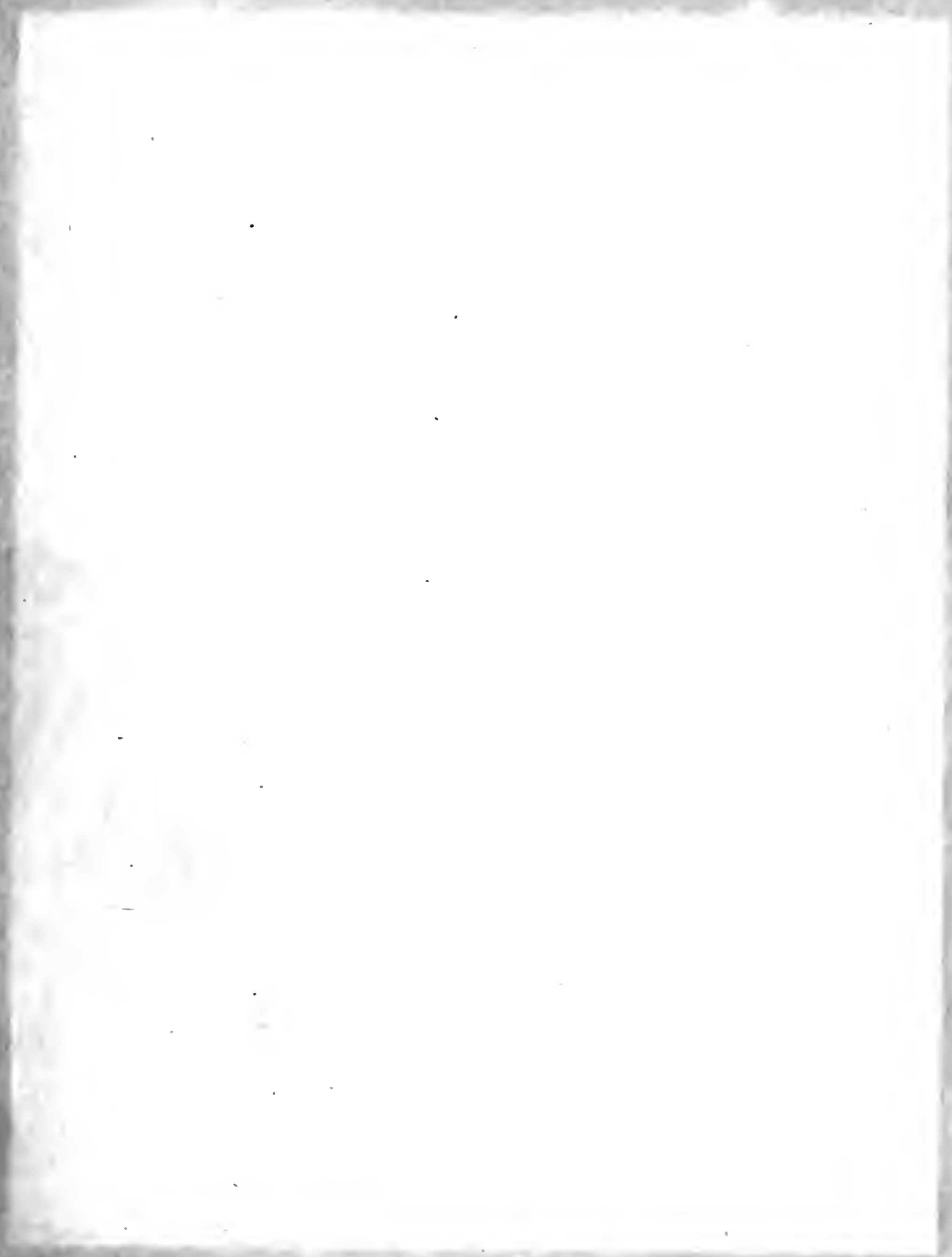
Presented by

____

EXTRACT FROM BY-LAWS.

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. A party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.



6.77

No. 1988

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WASHINGTON SECURITIES COMPANY, a corporation,
Appellants,

vs.

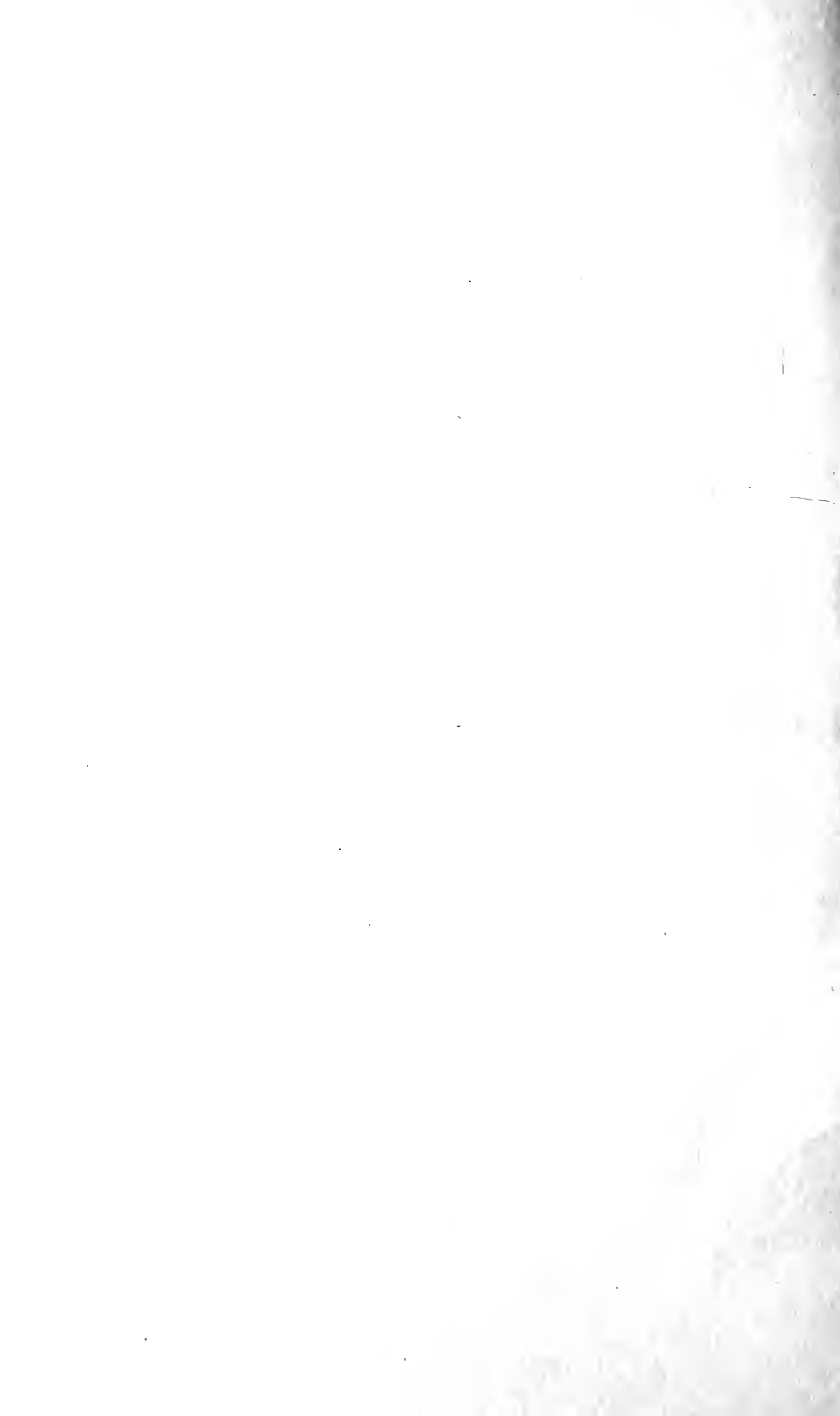
UNITED STATES OF AMERICA,
Appellee.

TRANSCRIPT OF RECORD

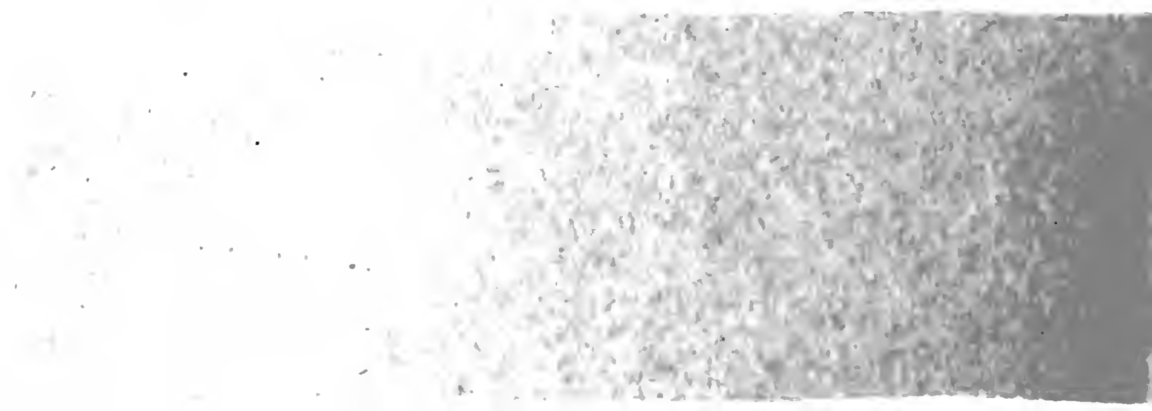
Upon Appeal from the United States Circuit Court,
for the Western District of Washington,
Northern Division.

FILED
JAN 6 - 1911

Lowman & Hanford Co., Seattle



Records of U.S. Circuit
Court of Appeals
683



No.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WASHINGTON SECURITIES COMPANY, a corporation,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the United States Circuit Court,
for the Western District of Washington,
Northern Division.

Lowman & Hanford Co., Seattle

INDEX.

	Page
Addresses of Counsel, Names and	1
Answer	11
Assignment of Errors	267
Bill of Complaint	1a
Bond on Appeal	272
Certificate of Clerk U. S. Circuit Court to Record	276
Certificate of Master to Proofs, etc	164
Citation on Appeal (Copy)	274
Citation on Appeal (Original)	278
Complainant's Exhibit "A"	166
Complainant's Exhibit "B"	181
Complainant's Exhibit "C"	200
Complainant's Exhibit "D"	218
Complainant's Exhibit "E"	238
Complainant's Exhibit "F"	239
Complainant's Exhibit "G"	240
Complainant's Exhibit "H"	242
Complainant's Exhibit "I"	242
Complainant's Exhibit "J"	244
Complaint, Bill of	1a
Decree	264
Defendant's Exhibit No. 1	245
Defendant's Exhibit No. 2	247
Defendant's Exhibit No. 3	249
Defendant's Exhibit No. 4	251
Defendant's Exhibit No. 5	253
Defendant's Exhibit No. 6	255
Defendant's Exhibit No. 7	257
Defendant's Exhibit No. 8	259
Exhibit "A," Complainant's	166
Exhibit "B," Complainant's	181
Exhibit "C," Complainant's	200
Exhibit "D," Complainant's	218

Page
Exhibit "E," Complainant's.......................... 238
Exhibit "F," Complainant's.......................... 239
Exhibit "G," Complainant's.......................... 240
Exhibit "H," Complainant's.......................... 242
Exhibit "I," Complainant's.......................... 242
Exhibit "J," Complainant's.......................... 244
Exhibit No. 1, Defendant's.......................... 245
Exhibit No. 2, Defendant's.......................... 247
Exhibit No. 3, Defendant's.......................... 249
Exhibit No. 4, Defendant's.......................... 251
Exhibit No. 5, Defendant's.......................... 253
Exhibit No. 6, Defendant's.......................... 255
Exhibit No. 7, Defendant's.......................... 257
Exhibit No. 8, Defendant's.......................... 259
Exhibits, Proceedings Re Introduction of Certain.. 16
Exhibits, Proceedings Re Introduction of Certain.. 163
Master's Certificate to Proofs, etc.................. 164
Master's Report.................................... 15
Memorandum Decision on the Merits.............. 261
Names and Addresses of Counsel.................. 1
Opinion on the Merits.......................... 261
Order Allowing Appeal.......................... 266
Order Fixing Amount of Cost-bond............... 271
Petition for, and Order Allowing Appeal.......... 266
Praecipe for Record on Appeal.................. 275
Proceedings Re Introduction of Certain Exhibits.. 16
Proceedings Re Introduction of Certain Exhibits.. 163
Replication.................................... 14
Report of Master in Chancery.................... 15
Testimony on Behalf of Complainant:
Boyle, Daniel.............................. 54
Cross-examination...................... 60
Colman, Lawrence J......................... 135
Cross-examination...................... 143
Redirect Examination.................... 145

Page

Testimony on Behalf of Complainant—Continued:
Corey, T. B. 17
Cross-examination 22
Evans, Earl 101
Cross-examination 103
Ford, J. C. 125
Fraser, John J. 93
Cross-examination 98
Fraser, S. D. 99
Klinker, Julius 80
Cross-examination 86
Redirect Examination 89
Martin, N. H. 123
Smith, C. J. 132
Cross-examination 134
Redirect Examination 135
Smith, C. J.,—Recalled 164
Smithers, F. G. 50
Cross-examination 53
Redirect Examination 54
Starkey, Samuel 26
Cross-examination 36
Redirect Examination 48
Walsh, Patrick 90
Whitworth, F. H.,—Recalled 129
Cross-examination 130
Whitworth, S. H. 103
Cross-examination 113
Redirect Examination 120
Recross-examination 121
Williams, Sidney J. 67
Cross-examination 70
Redirect Examination 79
Recross-examination 80

Page

Testimony on Behalf of Defendant:
Beal, L. C., Jr. 146
Cross-examination 147
Brockway, L. S. 145
Brockway, L. S.,—Recalled 154
Harrington, C. M. 148
Cross-examination 149
Harrington, H. 152
Cross-examination 153
Smith, C. J. 155
Cross-examination 157
Redirect Examination 158
Recross-examination 162

IN THE CIRCUIT COURT OF THE UNITED STATES

For the Western District of Washington, Northern Division

WASHINGTON SECURITIES COMPANY, a corporation, *Defendant and Appellant,* vs. UNITED STATES OF AMERICA, *Complainant and Appellee.*	No. 1706

Names and Addresses of Counsel.

ELMER E. TODD, Esq., U. S. Attorney,
Federal Building, Seattle, Washington,
Solicitor for Complainant and Appellee.

CHAS. P. SPOONER, Esq., and H. R. CLISE, Esq.,
Leary Building, Seattle, Washington,
Solicitors for Defendant and Appellant.

1 *In the United States Circuit Court for the Western District of Washington, Northern Division.*

UNITED STATES OF AMERICA, *Complainant,* vs. WASHINGTON SECURITIES COMPANY, a corporation, *Defendant.*	No. 1706. Bill of Complaint.

To the Honorable Judges of the United States Circuit Court for the Western District of Washington in Chancery Sitting:

Your orator, the United States of America, by and under the authority of Charles J. Bonaparte, Attorney General of the United States, brings this bill of complaint against the Washington Securities Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, and thereupon your orator complains of said defendant and shows unto your honors as follows:—

I.

That the defendant, the Washington Securities Company, is, and ever since the 31st day of March, 1906, has been a corporation organized and existing under and by virtue of the laws of the State of Washington.

II.

Your orator further shows unto your honors that that certain tract of land situated in King County in the Western

Judicial District of Washington, and particularly described according to the United States Survey as "Section thirty-four (34) Township twenty-two (22) North of Range 2 Seven (7) East of the Williamette Meridian" in the Seattle land district of the State of Washington, was at all times prior to issuance of the patents hereinafter mentioned a part of the public domain of the United States, and that the complainant was the legal owner, and was and still is the equitable owner in fee simple and entitled to the possession of said section; that at all times hereinafter mentioned said section of land was known mineral land and contained and still contains valuable workable deposits of coal in such quantities and of such character that it was and is more valuable to be mined for its coal than to be used for agricultural purposes, as the patentees hereinafter named well knew at the times they made application to purchase said land under the homestead laws of the United States, and at the times they received their patents to said land, and as said defendant well knew at the time it purchased said land as hereinafter set forth; that the land is now and was at all times herein mentioned wholly unfit for agricultural purposes, and is only valuable by reason of said coal deposits; that said land at all times herein mentioned was subject to entry as coal land in conformity with the laws of the United States, and was not subject to entry under the homestead laws of the United States.

III.

Your orator further shows unto your honors that on the 10th day of September, 1900, one Zachariah Turner filed with the proper officers of the United States land office at the city of Seattle, Washington, an application in writing to enter as a homestead the east one-half (E-½) of the east one-half 3 (E-½) of said Section thirty-four (34) Township twenty-two (22) North of Range seven (7) east of the Williamette Meridian, and at the time of filing said application filed therewith his non-mineral affidavit in accordance with the rules and regulations made and established by the Commissioner of the General Land Office of the United States

in conformity with the laws of the United States, in which affidavit he alleged among other things that he was well acquainted with the character of said described land, and that there was not to his knowledge within the limits thereof any deposits of coal; that thereafter on the 9th day of January, 1902, said Zachariah Turner desiring to commute his homestead entry upon said east one-half (E-½) of the east one-half (E-½) of Section thirty-four (34) Township twenty-two (22) North of Range seven (7) East of the Williamette Meridian, made and filed his final proof in writing before said land office, and with his final proof filed the non-mineral affidavit required by the rules and regulations of the Commissioner of the General Land Office in conformity to the laws of the United States; that said Zachariah Turner in his testimony upon final proof before said land office testified upon oath among other things that said land was most valuable for agricultural purposes, and that there was not any indications of coal on it, and in said affidavit he alleged that he was well acquainted with the character of the land and that there was not to his knowledge any deposits of coal within the limits thereof; that said testimony so given and said affidavits and the statements therein contained were false and fraudulent as the said Zachariah Turner well knew at the time of giving said testimony and at the time of making said affidavits, and said false

4

and fraudulent testimony was given, and said false and fraudulent affidavits were made by him for the purpose of fraudulently obtaining from the United States title to said land; that said land contained valuable deposits of coal, and was more valuable to be mined for said coal than to be used for agricultural purposes, and was unfit for agricultural purposes and of no value therefor, all of which said Zachariah Turner well knew; that on the said 9th day of January, 1902, upon said final proof the officers of said Seattle land office through mistake and inadvertence and without authority of law issued to said Zachariah Turner a Receiver's receipt for said land, and thereafter on the 2nd day of November, 1904, patent was issued to him by the United States conveying said land to him, which patent was issued to him through mistake

and inadvertance on the part of the officers of the Land Office of the United States and without any authority to issue it.

That on the 10th day of October, 1906, said Zachariah Turner and Mary Turner, his wife by deed conveyed the said land to one C. J. Smith, who was then and there the agent of the defendant for the purchase of said land, and who acquired said land solely for the used and benefit and in trust for said defendant, and who, with his wife, on or about the 10th day of October, 1906, conveyed said land to said defendant, and said defendant still holds the legal title thereof; that said defendant and said C. J. Smith, as its agent, on the 10th day of October, 1906, and for a long time prior thereto well knew that said land contained valuable deposits of coal; that it was mineral land, and was more valuable to mine for said coal than to be used for agricultural purposes, that it was unfit
5 for agricultural purposes and of no value therefor, and not subject to be entered under the homestead laws of the United States.

IV.

Your orator further shows unto your honors, that on the 5th day of August, 1901, one Odin A. Olsen filed with the proper officers of the United States Land Office at the City of Seattle, Washington, an application in writing to enter as a homestead the northwest quarter (NW-¼) of said section thirty-four (34) township twenty-two (22) north of range seven (7) east of the Williamette Meridian, and at the time of filing said application filed therewith his non-mineral affidavit in accordance with the rules and regulations made and established by the Commissioner of the General Land Office of the United States in conformity to the laws of the United States, in which affidavit he alleged among other things that he was well acquainted with the character of said described land, and there was not to his knowledge within the limits thereof any deposits of coal; that thereafter on the 6th day of May, 1903, said Odin A. Olsen desiring to commute his homestead entry upon said northwest quarter (NW-¼) of said section thirty-four (34) township twenty-two (22) north of range seven (7) east of the Williamette Meridian, made and filed

his final proof in writing before said land office, and with his final proof filed the non-mineral affidavit required by the rules and regulations of the Commissioner of the General Land Office in conformity to the laws of the United States; that said Odin A. Olsen in his testimony upon final proof before said land office testified upon oath among other things that said
6 land was agricultural land and that there was not to his knowledge any indication of coal on it, and in said affidavit he alleged that he was well acquainted with the character of said land, and that there was not to his knowledge any deposits of coal within the limits thereof; that said testimony so given and said affidavits and the statements therein contained were false and fraudulent as the said Odin A. Olsen well knew at the time of giving said testimony and at the time of making said affidavits, and said false and fraudulent testimony was given, and said false and fraudulent affidavits were made by him for the purpose of obtaining from the United States title to said land; that said land contained valuable deposits of coal, and was more valuable to be mined for said coal than to be used for agricultural purposes, and was unfit for agricultural purposes, and of no value therefor, all of which said Odin A. Olsen well knew; that on the said 6th day of May, 1903, upon said final proof the officials of said Seattle land office through mistake and inadvertence and without authority of law issued to said Odin A. Olsen a Receiver's receipt for said land, and thereafter on the 1st day of November, 1904, homestead patent was issued to him by the United States conveying said land to him, which patent was issued through mistake and inadvertence on the part of the officers of the Land Office of the United States. and without any authority to issue it.

That thereafter on the 10th day of February, 1905, said Odin A. Olsen by deed conveyed an undivided half interest in said northwest quarter (NW-¼) of section thirty-four (34) township twenty-two (22) north of range seven (7)
7 east of the Williamette Medrian, to one Thomas G. Spaight, who at the time of acquiring title to said half interest well knew that said land contained valuable deposits

of coal, that it was mineral land and more valuable to mine for said coal than to be used for agricultural purposes, that it was unfit for agricultural purposes and of no value therefor, and not subject to be entered under the homestead laws of the United States.

That thereafter on the 24th day of February, 1906, said Thomas G. Spaight and Lizzie Spaight, his wife, and said Odin A. Olsen by deed conveyed said land to C. J. Smith, who was then and there the agent of the defendant for the purchase of said land, and who acquired said land solely for the use and benefit and in trust for said defendant, and he, with his wife, on or about the 10th. day of October, 1906, conveyed said land to said defendant and said defendant still holds the legal title thereof; that said defendant and said C. J. Smith, as its agent, on the 10th day of October, 1906, and for a long time prior thereto well knew that said land contained valuable deposits of coal, that it was mineral land and more valuable to mine for said coal than to be used for agricultural purposes, that it was unfit for agricultural purposes and of no value therefor, and not subject to be entered under the homestead laws of the United States.

V.

Your orator further shows unto your honors that on the 31st day of December, 1902, one Robert L. Barbee filed with the proper officers of the United States land office at the city of Seattle, Washington, an application in writing to enter as a homestead the southwest quarter (SW-¼) of said section thirty-four (34) township twenty-two (22) north of range seven (7) east of the Willamette Meridian, and at the time of filing said application filed therewith his non-mineral affidavit in accordance with the rules and regulations made and established by the Commissioner of the General Land Office of the United States of America in conformity with the laws of the United States, in which affidavit he alleged among other things that he was well acquainted with the character of the said described land, and there was not to his knowledge within the limits thereof any deposits of coal; that thereafter on the 30th day of March, 1904, said Robert

8

L. Barbee desiring to commute his homestead entry upon said southwest quarter (SW-¼) of section thirty-four (34) township twenty-two (22) north of range seven (7) east of the Willamette Meridian, made and filed his final proof in writing before said land office, and with his final proof filed the non-mineral affidavit required by the rules and regulations of the Commissioner of the General Land Office in conformity to the laws of the United States; that said Robert L. Barbee in his testimony upon final proof before the land office testified among other things that said land was farming land, and that there was not to his knowledge any indication of coal on it, and in said affidavit he alleged that he was well acquainted with the character of the land and there was not to his knowledge any deposits of coal within the limits thereof; that said testimony so given and said affidavits and the statements thereon contained were false and fraudulent as the said Robert L. Barbee well knew at the time of giving the said testimony and at the time of making said affidavits, and said false and fraudulent testimony was given and said false and fraudulent

9 affidavits were made by him for the purpose of fraudulently obtaining from the United States title to said land; That said land contained valuable deposits of coal and was more valuable to be mined for said coal than to be used for agricultural purposes, and was unfit for agricultural purposes and of no value therefor, all of which said Robert L. Barbee well knew; that on said 30th day of March, 1904, the officers of said Seattle land office through mistake and inadvertence and without authority of law issued to said Robert L. Barbee a Receiver's receipt for said land, and thereafter on the 12th day of December, 1904, a homestead patent was issued to him by the United States conveying said land to him, which patent was issued to him through mistake and inadvertence on the part of the officers of the land office of the United States and without any authority at law to issue it.

That on the 10th day of October, 1906, said Robert L. Barbee, and Alice Barbee, his wife, by deed conveyed said land to one C. J. Smith, who was then and there the agent of the defendant for the purchase of said land, and who acquired

said land solely for the use and benefit and in trust for said defendant, and who, with his wife, on or about the 10th day of October, 1906, conveyed said land to said defendant, and said defendant still holds the legal title thereof; that said defendant and said C. J. Smith as its agent, on the 10th day of October, 1906, and for a long time prior thereto well knew that said land contained valuable deposits of coal, that it was mineral land, and was more valuable to mine for said coal than to be used for agricultural purposes, that it was unfit for agricultural purposes and of no value therefor, and not 10 subject to be entered under the homestead laws of the United States.

VI.

Your orator further shows unto your honors that on the 20th day of June, 1901, one Thomas B. Forsyth filed with the proper officers of the United States land office at the city of Seattle, Washington, an application in writing to enter as a homestead the west one-half (W-½) of the northeast quarter (NE-¼) and the west half of the southeast quarter (SE-¼) of said section thirty-four (34) township twenty-two (22) north of range seven (7) east of the Willamette Meridian, and at the time of filing said application filed therewith his non-mineral affidavit in accordance with the rules and regulations made and established by the Commissioner of the General Land Office of the United States in conformity with the laws of the United States, in which affidavit he alleged among other things that he was well acquainted with the character of said described land and that there was not to his knowledge within the limits thereof any deposits of coal; that thereafter on the 25th day of November, 1903, said Thomas B. Forsyth desiring to commute his homestead entry upon said west half (W-½) of the northeast quarter (NE-¼) and the west half (W-½) of the southeast quarter (SE-¼) of said section thirty-four (34) township twenty-two (22) north of range seven (7) east of the Willamette Meridian, made and filed his final proof in writing before said land office, and with his final proof filed the non-mineral affidavit required by the rules and regulations of the Commissioner of the General Land Office in conformity

to the laws of the United States; that said Thomas B. Forsyth in his testimony upon final proof before said land
11 office testified upon oath among other things that said land was fit for agricultural purposes and that there was not any indication of coal on it, and in said affidavit he alleged that he was well acquinted with the character of the land and that there was not to his knowledge any deposits of coal within the limits thereof; that said testimony was given and said affidavits and the statements therein contained were false and fraudulent as the said Thomas B. Forsyth well knew at the time of giving said testimony and at the time of making said affidavits, and said false and fraudulent testimony was given and said false and fraudulent affidavits were made by him for the purpose of fraudulently obtaining from the United States title to said land; that said land contained valuable deposits of coal and was more valuable to be mined for said coal than to be used for agricultural purposes and was unfit for agricultural purposes and of no value therefor, all of which said Thomas B. Forsyth well knew; that on the 27th day of November, 1903, upon said final proof the officers of the Seattle land office through mistake and inadvertence and without authority of law issued to said Thomas B. Forsyth a Receiver's receipt for said land, and thereafter on the 3rd. day of August, 1904, a homestead patent was issued to him by the United States conveying said land to him, which patent was issued to him through mistake and inadvertence on the part of the officers of the land office of the United States, and without any authority to issue it.

That on the 4th day of May, 1906, said Thomas B. Forsyth and Margaret W. Forsyth, his wife, by deed, conveyed said land to one C. J. Smith, who was then and there
12 the agent of the defendant for the purchase of said land, and who acquired said land solely for the use and benefit and in trust for said defendant, and who, with his wife, on or about the 14th day of May, 1906, conveyed said land to said defendant, and said defendant still holds the legal title thereof; that said defendant and said C. J. Smith, as its agent, on the 4th day of May, 1906, and for a long time prior thereto

well knew that said land contained valuable deposits of coal, that it was mineral land, and was more valuable to be mined for said coal than to be used for agricultural purposes, that it was unfit for agricultural purposes and of no value therefor, and not subject to be entered under the homestead laws of the United States.

For as much, therefore, as your orator is without adequate remedy in the premises, except in the court of equity where such matters are properly relievable, and to the end that said defendant, the Washington Securities Company, a corporation, may be required according to the best of its knowledge, information and belief, to make full, true, direct and perfect answer to all and singular the matters hereinbefore contained and alleged as fully and particularly as if the same were here repeated, and that said defendant be distinctly interrogated thereto.

Your orator prays that said patents so erroneously issued from the United States to said Zachariah Turner, Odin A. Olsen, Robert L. Barbee and Thomas B. Forsyth may be canceled, annuled, set aside and held for naught, and that said defendant be foreclosed of any interest, right or title that it may have in and to the land described in said patents, 13 and that it be decreed that the complainant is and was the owner in fee of such lands, and that the pretended title of said defendant be decreed to be void, and that it shall be ordered and decreed to release and convey its pretended title and all interests claimed by it in and to said lands to this complainant, and that complainant may have such other and further relief in the premises as equity may require, and to your honors shall seem meet.

May it please your honors to grant unto your complainant a writ of subpoena in chancery directed to the defendant, the Washington Securities Company, a corporation, commanding it to be and appear before your honors at a day therein named, then and there a full, true, correct and perfect answer to make, (but not under oath, answer under oath being hereby specifically waived), to all and singular the premises, and to

stand to, perform and abide by such further order and direction and plea herein as to your honors shall seem meet.

CHARLES J. BONAPARTE,
Attorney General.
ELMER E. TODD,
United States Attorney.

Endorsed: Bill of Complaint. Filed in the U. S. Circuit Court, Western Dist. of Washington, Aug. 13, 1908, A. Reeves Ayres, Clerk, A. N. Moore, Dep.

14 *In the United States Circuit Court for the Western District of Washington, Northern Division.*

UNITED STATES OF AMERICA,
Complainant,
vs.
WASHINGTON SECURITIES COMPANY, a corporation,
Defendant.

No. 1706.
Answer.

To the Honorable Judges of the United States Circuit Court for the Western District of Washington, in Chancery Sitting:

Comes now the Washington Securities Company, a corporation, defendant in the above entitled cause, now and at all times hereafter saving to itself all and all manner of benefit of exception, or otherwise, that can or may be had or taken, to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering says:

I.

That it admits the allegations of said Paragraph I of said Bill of Complaint.

II.

Answering the allegations of Paragraph II of said Bill of Complaint, it admits that the tract of land described in said

Paragraph was at all times prior to the issuance of the patents therefor, a part of the public domain of the United States, but it denies that said said complainant was or is the
15 equitable owner in fee simple, or otherwise, of said tract of land, or is or has been entitled to the possession thereof since the issuance of said patents therefor. It admits that said land contained and still contains valuable workable deposits of coal. Except as hereinbefore expressly admitted, or otherwise denied, this defendant denies each and every allegation, matter, statement and thing contained in said Paragraph II.

III.

Answering the allegations of Paragraph III of said Bill of Complaint, this defendant admits the allegations of said paragraph from the beginning thereof to and including the words "within the limits thereof" in line 21 on page 3 of said Bill of Complaint. This defendant denies each and every allegation, matter, statement and thing contained in said Paragraph III from and including the words "that said testimony" in lines 21 and 22 on page 3 of said Bill of Complaint, to and including the end of said paragraph 3, save and except that it admits that a patent was issued to said Turner for said land, and the same was conveyed by said Turner to one C. J. Smith, as agent for defendant, and said land was conveyed by said Smith to this defendant, who still holds the legal title thereof.

IV.

Answering the allegations of Paragraph IV of said Bill of Complaint, this defendant admits the allegations from the beginning thereof to and including the word "thereof" in line 24 on page 5 of said Bill of Complaint. This defendant denies each and every allegation, matter, statement and thing contained in said paragraph IV from and including the words "that said testimony" in line 24 on page 5 of said Bill of Complaint, to and including the end of said paragraph, save
16 and except that it admits that a patent was issued to said Olson for the said tract of land described in said paragraph and that an undivided one-half interest therein was

conveyed by said Odin A. Olsen to one Thomas G. Spaight, and that all of said land was conveyed by said Spaight and wife and said Olsen to said C. J. Smith, as agent for defendant, and was thereafter conveyed by said Smith to this defendant, who still holds the legal title thereof.

V.

Answering the allegations of Paragraph V of said Bill of Complaint, this defendant admits the allegations from the beginning thereof to and including the words "within the limits thereof," in lines 5 and 6 on page 8 of said Bill of Complaint, Denies each and every allegation, matter, statement and thing contained in said paragraph from and including the words "that said testimony" in line 6 on page 8 of said Bill of Complaint, to and including the end of said paragraph, save and except that it admits that a patent was issued to said Barbee for the land described in said paragraph, and that the same was conveyed by said Robert L. Barbee and wife to said C. J. Smith, as agent for defendant, and said land was conveyed by said C. J. Smith to this defendant, who still holds the legal title thereof.

VI.

Answering the allegations of paragraph VI of said Bill of Complaint, this defendant admits the allegations from the beginning thereof, to and including the words "within the limits thereof" in line 11, page 10 of said Bill of Complaint. Denies each and every allegation, matter, statement and thing contained in said paragraph VI from and including the words "that said testimony" in lines 11 and 12 on page 10 of

17 said Bill of Complaint to and including the end of said paragraph VI, save and except that it admits that a patent was issued to said Forsythe for said land, and that said Thomas B. Forsythe and wife conveyed the land described in said paragraph to said C. J. Smith as agent for defendant, who conveyed the same to this defendant, and that this defendant still holds the legal title thereof.

WHEREFORE, this defendant having fully answered, confessed, traversed and avoided or denied all of the matters in said Bill of Complaint material to be answered, according to

its best knowledge and belief, humbly prays this Honorable Court to enter its judgment and decree that this defendant be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

And for such further and other relief in the premises as to this Honorable Court may seem meet and in accordance with equity.

BOGLE & SPOONER,
Attorneys for Defendant.

We hereby acknowledge service of the within Answer and the receipt of a true copy thereof, this 4th day of March, 1909.

ELMER E. TODD,
Attorney for Complainant.

Endorsed: Answer. Filed U. S. Circuit Court, Western District of Washington, Mar 8, 1909, A. Reeves Ayres, Clerk,
W. D. Covington, Deputy.

18 *In the United States Circuit Court for the Western District of Washington, Northern Division.*

UNITED STATES OF AMERICA, *Complainant,* vs. WASHINGTON SECURITIES COMPANY, a corporation, *Defendant.*	No. 1706. Replication.

Replication of the United States of America to the answer of the above named defendant, Washington Securities Company, a corporation:

This replicant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of said defendant, for replication thereupon sayeth that it does and will ever maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by

said defendants, and that the answer of said defendant is very uncertain, evasive, and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all of which matters and things this replicant is ready to aver, maintain, and prove, as this honorable court shall direct, and humbly as in and by its said bill it has already prayed.

ELMER E. TODD,
United States Attorney.

19 Received a copy of the within Replication this 9 day of March, 1909.

BOGLE & SPOONER,
Attorney for Defendant.

Endorsed: Replication. Filed U. S. Circuit Court, Western District of Washington, Mar 9, 1909, A. Reeves Ayres, Clerk, W. D. Covington, Deputy.

20 *In the United States Circuit Court for the Western District of Washington, Northern Division.*

UNITED STATES OF AMERICA,
Plaintiff,
vs.
WASHINGTON SECURITIES COMPANY, a corporation,
Defendant.
No. 1706.

To the Honorable Judges of the Circuit Court of the United States, Western District of Washington, Northern Division, sitting in equity.

I, Roger S. Greene, as United States Master in Chancery for said Western District of Washington, Northern Division, residing at the City of Seattle, King County, Washington, do hereby certify, return and report, that pursuant to an order of the above entitled Court by which it was referred to me as such

Master to hear, inquire and report to the Court all matters in evidence, together with all pleadings, files, exhibits, papers and documents whatsoever in the above entitled cause, I designated Octobr 14th, 1909, at my office in the Federal Building, Seattle, King County, Washington, as the time and place for the taking of the testimony and the proofs in said cause, which order is hereunto annexed and returned and filed herewith; that at said time and place Mr. Elmer E. Todd, United States District Attorney, appeared for the plaintiff, and Mr. Charles P. Spooner (of Messrs. Bogle & Spooner), appeared for the defendant, and proceeded with the taking of such testimony and proofs. And that the firm of Bolster, Eaton &
21 Richards, being agreeable to the parties, was by me designated to act as stenographers in said cause, and the members of said firm acting as stenographers in said cause were duly sworn as stenographers to take such proofs and testimony; and thereupon the following witnesses were by me first carefully cautioned and duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, and that the following depositions were in the following order taken and the following proceedings were had before me in said cause, to-wit:

22 MR. TODD: I wish to offer in evidence, as complainant's exhibit "A", a certified copy of the homestead entry of Robert L. Barbee, together with the final proof and other papers, certified by the recorder of the General Land Office at Washington.

THE MASTER: Has the other side any objection?

MR. SPOONER: I object to it as not the best evidence.

THE MASTER: Objection overruled.

MR. SPOONER: Objected to as irrelevant and immaterial and not the best evidence.

THE MASTER: Objection overruled.

Papers referred to were marked complainant's exhibit "A", same being returned herewith.

MR. TODD: I offer in evidence, as complainant's exhibit "B", the papers in the homestead entry of Thomas B. Forsyth—

the original application and the final proof and the other papers as certified by the recorder of the general land office.

MR. SPOONER: The same objection.

THE MASTER: Objection overruled.

Papers referred to were marked complainant's exhibit "B", same being returned herewith.

MR. TODD: I offer in evidence, as complainant's exhibit "C", a duly certified copy of the homestead entry of

23 Ordin A. Olsen, including the application and final proof and other papers, properly certified by the recorder of the General Land Office at Washington.

MR. SPOONER: The same objection.

THE MASTER: Objection overruled.

Papers referred to were marked complainant's exhibit "C", same being returned herewith.

MR. TODD: I offer in evidence, as complainant's exhibit "D", certified copies of the homestead entry of Zachariah Turner, including the application for a homestead and the final proof as certified by the Recorder of the General Land Office at Washington.

MR. SPOONER: The same objection.

THE MASTER: Objection overruled.

Papers referred to were marked complainant's exhibit "D", same being returned herewith.

T. B. COREY, produced as a witness on behalf of PLAINTIFF, having been first duly sworn, testified as follows:

Q (Mr. Todd) State your full name?

A T. B. Corey.

Q What is your profession?

24 A Mining man—coal mining man.

Q How long have you been a coal mining man in this state?

A About twenty years.

Q What positions have you held?

A I was at one time superintendent of the Oregon Improvement Company's mines.

Q What years were those?

A It was along in 1889 and 1890, and then I changed to

the Pacific Coast and I was superintendent I think until 1897 for the Pacific Coast Company.

Q I ask you if you are familiar with section 34, township 22 north, range 7 east of the Willamette Meridian, situated in this county?

A I visited that section in September, 1890.

Q What is the character of that land?

A As far as timber, or what?

Q Well, as far as its character, for what is it valuable?

A Timber and—

MR. SPOONER: (Interrupting) It is objected to as irrelevant and immaterial.

THE MASTER: Objection overruled.

Q (Mr. Todd) Go ahead, Mr. Corey.

A Coal land and timber land.

Q How long have you known that to be coal land?

A Since 1890.

Q That is the time you examined it?

A Yes sir.

Q At whose request did you examine it?

A McNeal's.

Q Who is he?

25 A H. W. McNeal. He was resident manager of the Oregon Improvement Company.

Q Did you make any report upon that examination?

MR. SPOONER: Objected to as irrelevant and immaterial.

THE MASTER: Objection overruled.

A I did.

Q (Mr. Todd) To whom did you make report?

A H. W. McNeal.

Q Who succeeded Mr. McNeal as manager of the Oregon Improvement Company?

A C. J. Smith.

Q Now, state what you found as an expert, as to the character of that land, from a coal standpoint?

MR. SPOONER: This is objected to as not the best evidence. His testimony already shows that he made a report on this.

THE MASTER: Objection overruled.

MR. SPOONER: Objected to as irrelevant and immaterial.

Q (Mr. Todd) Have you a copy of that report with you?

A I have.

Q Please produce it.

A (Witness produces paper).

Q Have you made a search for the original of this report?

A I turned over the original to Mr. McNeal. I kept a copy of it.

Q Have you made a search for the copy of that report that you made?

A I have.

Q Have you been able to find it?

A I have not.

26 Q Is this copy which you show here a true copy of the report which you made to Mr. McNeal?

A I believe it to be.

MR. TODD: I offer this report in evidence.

MR. SPOONER: Objected to as not the best evidence and as irrelevant and immaterial.

THE MASTER: Is the original in the hands of the defendant?

MR. TODD: I don't know where the original is.

THE MASTER: What has become of the original?

MR. TODD: He gave the original—the report is in the form of a letter which was sent to Mr. McNeal, the manager of the Oregon Improvement Company.

THE MASTER: The Oregon Improvement Company is not a party to this proceeding.

MR. TODD: No.

Q (The Master) Did you hand this report to some person, or was it sent by mail?

A I handed a copy of this report to Percy Smith, I think it is.

Q (Mr. Todd) No, the original the judge means.

A Oh, the original. Oh, I sent that to Mr. McNeal, by letter, if I remember rightly.

THE MASTER: I do not quite understand, Mr. Todd, to what end you propose—

MR. TODD: The real reason that I offer this is because Mr. Spooner objected that I did not offer the report. I have not been able to find the original of the report, and this is a copy of it. I do not insist that this go in evidence. I
27 offered this for Mr. Spooner's benefit.

THE MASTER: Of course, Mr. Todd, the actual fact as regards the land is one thing, and notice brought home to these parties, which would effect the decision in this case, is quite another thing.

MR. TODD: Yes.

THE MASTER: And I don't know whether you are seeking, by the introduction of this report, or a copy of it, to show what the witness found or to show what knowledge the transferee of the report, or any copy of it, had of the facts.

MR. TODD: No, simply to show what the witness found. I am simply seeking by this witness to show what he found and ascertained by an examination.

THE MASTER: Well, then, I sustain the objection to it.

MR. TODD: Very well.

Q (Mr. Todd) Mr. Corey, what did you find, from your examination of the land there in 1890?

MR. SPOONER: Objected to as irrelevant and immaterial.

THE MASTER: Objection overruled.

A Why, I found a tunnel there, if I remember right, 50 feet long, driven in on the vein.

Q Just describe the character of coal you found?

A I don't remember the cross section exactly, from memory, but I think there was about six feet of coal and about five inches or so of dirt mixed in with this coal, with a good roof, and the floor I think was a soft floor.

Q What work if any had been done upon the section in the way of prospecting or working the vein?

A This tunnel had been driven. There was also a
28 slope had been driven, but it was full of water, I did not go into that.

Q Do you remember what part of the section the tunnel and slope were on?

A No, I could not without referring—I think it was the southwest quarter that this tunnel was on.

Q What kind of coal was it?

A Bituminous, soft.

Q What kind of a vein?

A The vein was six—there was six feet of coal; about five inches and a half of dirt, if I remember aright.

Q State whether the coal was of such an extent that it would pay to mine it?

A I considered that it would.

Q What did you find the land to be valuable for, chiefly?

MR. SPOONER: This is objected to as incompetent, irrelevant and immaterial. It is a conclusion, nothing else.

MR. TODD: This man is an expert.

THE MASTER: Objection overruled.

A I considered three fourths of the ground as good coal land, and the whole of it good timber land.

Q The whole of it good what?

A Timber land.

Q How did the coal compare with neighboring mines around there?

A Well, I drew a comparison, I think, in that letter, in which I considered it better than section 26. That was Kangley.

Q What is the Kangley mine?

A That has been abandoned since.

29 Q Was it being worked at that time?

A I think it was.

Q By what company?

A By the Northern Pacific or the Northwestern Improvement Company, I don't know which.

Q Had you known of this section as coal land prior to the time you examined it, had you heard of it as coal land?

A I had.

Q For how long?

A Oh, for probably a year; I don't remember exactly.

Q How generally was that land known as coal land?

MR. SPOONER: Objected to as irrelevant and immaterial.

THE MASTER: Objection overruled.

A Well, it is pretty hard to answer that question. I think it was generally known, though, as being coal land.

CROSS EXAMINATION.

Q (Mr. Spooner) You say that you found a tunnel about 50 feet long?

A Yes sir.

Q That had been run there. That was the answer that you gave to his question as to what evidences of prospecting you found there?

A Yes sir.

Q Was that the sole evidence of prospecting?

A I think I went over to the slope and found it full of water, and I could not go in.

Q That was all there was, was it, at that time?

30 A Yes sir, that was all.

Q But this action, you know, refers to this entire section 34.

A I don't know what it refers to.

Q Well, it refers to section 34. In answer to one of Mr. Todd's questions a moment ago—he asked you what proportion of this land was valuable for coal; you said three fourths of it?

A Yes.

Q In view of the fact that the only evidences of prospecting that you found were a 50 foot tunnel in one place, and a stope, what is the basis of your statement? that three quarters of the land is valuable for coal?

A From general information and also from what I saw.

Q What is the general information?

A Mr. Williams and Mr. Morgan, who accompanied me at that time—Mr. Morgan was chief mine inspector—

Q (Interrupting) When I say I am asking you for general information, you are trying to give me specific statement perhaps of some individuals. I do not want that, I want the

general information that you have reference to. Do you know that three fourths of that land is valuable for coal?

A That was the conclusion that we came to, from talking the matter over.

Q That is what you mean by general information?

A Yes. That is I refer to other reports—

Q (Interrupting) Did these gentlemen have any better means of information than you did?

A I think they had.

31 Q Were there further evidences of prospecting on the land that they could see that you could not, other than this 50 foot tunnel and the stope you speak of?

A That I could not say.

Q Did they mention other evidences of prospecting in talking with you, that you hadn't been able to see, but that they had been able to see?

A Well, I don't remember of any. I go generally—

Q (Interrupting) So far as you know, the only evidences of prospecting on there is, as you have stated to Mr. Todd here, this 50 foot tunnel and the stope?

A That is right.

Q You went up there for the purpose of ascertaining, didn't you?

A Yes.

Q And so far as you know those were the only evidences that either of these other gentlemen had?

A They were familiar with it and they said, if I remember aright, that it was useless to go any further than just to see what I did see.

Q So far as you know, I say, the evidences that you saw of prospecting when you went up there to ascertain the value of this property was the evidence that they had of prospecting, you know of no other prospecting evidences on the property, do you?

A Only what I have mentioned.

Q Only what you mentioned?

A Yes.

Q Is it possible, do you think—reasonably possible to support the statement that three quarters of a section is
32 valuable for coal land when the only evidences of the presence of coal that you saw were this 50 foot tunnel and the stope which was filled with water?

A Well, it was only—my visit over there was only a preliminary examination to find out—

Q (Interrupting) What other examination—you base your answer upon that examination, don't you?

A Yes.

Q Well then, preliminary or otherwise, that is the examination upon which you made the statement that three quarters of the land is valuable for coal purposes, isn't it?

A That is the conclusion I came to after—

Q (Interrupting) That is the conclusion you came to?

A Yes sir.

Q What else did you find there to support that conclusion? aside from this prospecting?

A Nothing only my conversation with these two gentlemen that was with me.

Q That is all.

A Yes.

Q A few moments ago Mr. Todd asked you what proportion of the property was valuable for coal. You said three quarters of it, didn't you?

A That was the conclusion I came to at that time, yes.

Q Well, I asked you how much property this suit involved. You said you didn't know, didn't you?

A No, I don't know.

Q I asked you if it involved a section and you said you didn't know?

33 A I said I don't know how much it involved.

Q Well then, how do you make the statement that three quarters of it is valuable for coal, if you don't even know how much land he was asking you?

A He was asking me about this section.

Q That is what I asked you just now, how much was involved here?

A He asked me about this section. All I know is what I know from what he is asking me there in regard to the amount that is involved. I don't know.

Q He asked you whether or not it was generally known in the community as coal land?

A. Yes.

Q And you said "Yes"?

A Yes.

Q What did you mean by that?

A Why, amongst miners, you heard miners talk about it.

Q How many times have you ever been up there?

A I never have been on that but the once.

A No. Sir.

Q Were you interested in any mine in the vicinity?

A I had charge of the Franklin mine.

Q Outside of the Franklin mine?

A No, not personally interested.

Q The Kangley mine was being worked at that time, was it?

A Well, now, I could not say positively. I think it was, though.

Q That adjoins this property, doesn't it?

A Close to it.

Q Pretty close to it?

34 A Yes sir.

Q And it has been abandoned?

A Yes.

Q How about the Durham mine, which adjoins it or is close to it?

A Well, that was not being worked either.

Q That has been abandoned, hasn't it?

A Practically so, I understand.

Q You made the statement, in answer to Mr. Todd's question as to what you found in regard to the size of the vein, etc., that it was soft coal seven feet?

A I think not.

Q I understood you to say that, or six feet.

A Six feet.

Q Six feet?

A Yes.

Q Don't you mean six inches?

A No.

Q Just refresh your memory from looking at that.

A I take the total there, you see. Six feet five and a half inches of coal and five inches and a half od dirt.

Q Oh, yes.

A You see this is the total.

Q Oh, yes, I see. Without adding the total. As to how far that extended outside of what you saw in the tunnel, you could not state, could you?

A I could not.

THE MASTER: Describe this land as regards it surface.

MR. TODD: There will be other witnesses that will
35 go into that question, who are a good deal more familiar with it than Mr. Corey is, as he only saw it once.

THE WITNESS: It is nineteen years ago that I saw it and I could not really describe what the surface is.

Q (The Master) What was there about the land that made you think it was not adapted for agriculture?

A Well, I judge from its roughness. I have not testified in regard to whether it was fot for agricultural purposes—I don't think I have.

THE MASTER: It probably is involved in some of your answers to the direct examination. That is all.

(Witness excused.)

SAMUEL STARKEY, produced as a witness on behalf of PLAINTIFF, having been first duly sworn, testified as follows:

Q (Mr. Todd) Please state your full name?

A Samuel Starkey.

Q Where do you live?

A Durham.

Q How long have you lived there?

A Twenty-two years last August.

Q How far is Durham from section 34—

A Adjoins it, sir.

Q (Continuing) —in township 22 north, range 7
36 east of the Willamette Meridian. On which side?

A On the north side.

Q What is your occupation?

A A miner, sir.

Q How long have you been a miner?

A All my life.

Q What mines have you worked in in this county?

A In Newcastle, Black Diamond, Durham, Occidental.

Q Are you working in any mine at the present time?

A I am looking after the Durham property. I lived there, just looking after it.

Q How long have you been looking after it?

A Since the mine stopped. It is about—oh, it may be seventeen years, sixteen or seventeen years.

Q Are you familiar with section 34?

A I have worked on it, sir.

Q How long have you known that section?

A Oh, I have known it about—it is twenty-four years since I worked on it, past.

Q What is the topography of the ground, the character of the ground as to—

A (Interrupting) Well, I don't know much about the land, but I know the coal, I worked in the coal.

Q Well, I mean what is the surface of the land, how is the surface of the land.

A It is—

Q (Interrupting) Level or rough?

A Oh, it is rough.

Q How rough?

A That is, some parts of it is very rough. Why,

37 it is mountain—regular mountain.

Q What is the name of that mountain?

A Sugar Loaf, I believe.

Q How high is that mountain?

A Oh, it may be five or six hundred feet, maybe more than that.

Q What part of the section is level?

A The southeast quarter is pretty level, that is, the most of it.

Q What is the character of the soil on the southeast quarter?

A Well, I am a very poor judge. For my part I would not, as I told Mr. Smith I would not give ten dollars for anything only for the coal and the timber that was on it.

Q Is the section still timbered?

A Well, there is lots of mining timber on it, yes sir.

Q What do you mean by mining timber, Mr. Starkey?

A To make posts and laggings and such like.

Q What are the sizes of the trees?

A Well, there are some—one foot, some may be a little more, some may be two feet, for anything I know, you know. I have not examined it all.

Q This Sugar Loaf, is that rocky or otherwise?

A Well, there is a great deal of gravel in it, and there are some rocks in it, of course.

Q You say you have worked on that section?

A Yes sir.

Q When did you work on it?

A I worked on it past twenty-four years.

38 Q What did you do on it?

A I worked in the tunnel there, and I helped to put eleven sets of timber, shaping the slope off.

Q On what part of the section was that tunnel?

A It is on the southeast quarter.

Q When was that tunnel put there?

A Well, I worked on it twenty-four years ago, but there was some work done before I went there.

Q How far did that tunnel extend in?

A Well now, I am sure I could not tell you; I didn't measure it.

Q Well, approximately, Mr. Starkey, I mean?

A Well, it may be in 50 feet, for anything I know, and may be more and may be less; I could not tell you exactly; I did not measure it.

Q How far was the coal below the surface?

A Where we found it?

Q Yes.

A Where I worked?

MR. SPOONER: What was that question?

Q (Mr. Todd) How far was the coal below the surface?

A Well, I think it must be about—it might be 50 feet below the surface, that is, after we got in a piece, you know.

Q Were there any outcroppings?

A Yes sir.

Q Where were those outcroppings on the section?

A I showed Mr. Smith one.

Q Well, show us?

A Well, I could not show you.

39 Q Well, I mean tell us, tell us, Mr. Starkey?

A It is pretty near on the line—on the line of section 3 and section 34, the croppings are.

Q Now, when did you show them to Mr. Smith?

A I showed them to him last Thursday. Wasn't it last Thursday, Mr. Smith?

Q Well, I don't care anything about that. Did you ever show them to him at any prior time?

A No sir.

Q What is the character of that land as to being coal land?

A Well—

Q (Interrupting) That section?

A The coal as we have on Durham—my opinion is that it runs right across—

MR. SPOONER: (Interrupting) This is objected to as not responsive to the question, as irrelevant and immaterial. I don't think that is what you are asking.

MR. TODD: No, that is not what I was after.

Q (Mr. Todd) State whether or not that section is coal land?

A It is coal land, yes sir.

Q How long have you known it to be coal land?

A I have known it to be coal land about, as I tell you, since I worked on it; but I heard before that it was coal, when I went from Newcastle.

MR. SPOONER: That is objected to as hearsay, and ask that it be stricken out.

MR. TODD: Well, the testimony as to whether land is known coal land is necessarily hearsay testimony, and
40 as to whether a witness has heard it is coal land is necessarily hearsay, but it is competent and relevant. One of the issues in this case is as to whether this land was known coal land.

THE MASTER: Objection overruled.

MR. SPOONER: I want to call the court's attention to this distinction: There is a great difference between the witness being able to testify to a fact, that it is known coal land, and his being able to testify that he heard it was coal land. He might hear one person say it, or two people, but the other thing is a fact.

THE MASTER: Well, he cannot testify as to its being known coal land without something further appears than appears as yet in the testimony. I suppose it is possible for a man to testify that land is known as coal land.

Q (Mr. Todd) Mr. Starkey, how generally was this known to be coal land?

A Why, I really believe there is not a man living in ten miles of that place but what knew it was coal land at that time.

Q What do you mean by that time?

A At the time as I worked on it.

Q That was how many years ago?

A Twenty-four years ago past.

Q How far is Black Diamond from there?

A Black Diamond I think is about seven miles across right on a direct line.

Q How far is Franklin from there?

A About five or six.

Q How far is Lawson from there?

41 A Well, that may be about the same distance.

Q Lawson had not been opened up at that time, had it?

A No sir.

Q Was Black Diamond—

A (Interrupting) Let me see. Lawson hadn't been opened up, no sir.

Q The Black Diamond mine was open at that time?
A Yes sir—that is, they were working there, yes.
Q For whom did you do the work on this section?
A I was sent up by Mr. Williams.
Q Who was Mr. Williams?
A He used to be superintendent for Newcastle.
Q Do you remember what year that was?
A He was not superintendent at that time when he sent me up there to work.

Q Do you remember what year that was you were sent up there?

A Let's see, I think it was in 1885, if I recollect right; I ain't sure now, it has been so long, twenty-four years. I have been in Durham a little over twenty-two years and it was two—I think it is about twenty-four years, if I recollect right.

Q Who went up with you?
A I went with Degolsworthy, the packer; he used to pack the stuff into 34.

Q What did you find on that section when you went up there at that time?

A I found a cabin and some clearing and I found this tunnel was driven in some distance when I went there.

42 Q (Mr. Todd) Where did you do your work on the section at that time?

A In the tunnel, and I helped to put in—I think it was eleven sets of timber to form—to shape the slope off.

Q Did you take any coal out at that time?
A We had to wheel it out, yes sir.
Q What did you do with the coal that you took out?
A Just put it aside there.
Q How long did you work there at that time?
A If I recollect right, it was about six weeks.
Q (Mr. Spooner) How long?
A About six weeks.
Q (Mr. Spooner) Weeks?
A Sic weeks, yes sir.
Q (Mr. Todd) Is that the only time you worked there?
A Yes sir.

Q Is that the only tunnel that has been put on that section?

A I don't think so, but of course that is the only tunnel I ever worked in.

Q What?

A That is the place I worked in.

Q Well, I say have you ever seen any other tunnels on the section?

A I have seen some openings on there, yes.

Q Where?

A Very near on the—on Barbee's place.

Q On Barbee's part of it?

A Barbee's quarter, yes.

Q What kind of an opening did you see there?

43 A Why, it is pretty well filled up, but you can see the coal there.

Q Do you know when that opening was made?

A No sir.

Q When did you first see it there?

A I saw it when I went up there.

Q At that time?

A Yes sir.

Q Have you ever seen any slopes on that section?

A Only the one as we shaped.

Q The one you shaped?

A Yes sir.

Q That is the one to which you refer as a tunnel?

A No, the tunnel was drove in, you see, understand the tunnel was drove in and then we came out from the mouth—to the mouth of the tunnel, you understand, and we started to sink at the mouth of the tunnel.

Q Oh, I see. It was the same opening?

A Yes sir.

Q Do you know Zach Turner?

A Yes sir.

Q How long have you known him?

A Why, I have known him fifteen years, I believe.

Q Where has he lived during that fifteen years?

A He lived down at a place called Kanasket first, but it was not Kanasket at that time.

Q How far was that from this section?

A Oh, it is a little over a mile, a mile and a half maybe.

Q Where did he live after that time?

A He lived in a store at Palmer.

44 Q How far was that from this section?

A Two mile and a half.

Q What did he do at Palmer?

A He kept a store.

Q How long?

A Well, indeed I could not tell you how long he was there.

Q A number of years?

A Yes, a number of years.

Q What other business has he carried on, that you know of?

A He used to peddle a little—before he had the store, though, this was.

Q During the past fifteen years he has lived at Kanasket and Palmer then?

A Yes sir; and then he used to live at Franklin.

Q When was that?

A I think before he came—before he came in this little place.

Q What did he do at Franklin?

A He worked in the mine and in the store there too.

Q You have kept up your acquaintance with him since he made the homestead entry on this land?

A Oh, yes, we have talked it over several times.

Q Did you ever talk over the character of this land with him, about the time he made the homestead entry?

A Yes.

Q What was the nature of your conversation?

A I told him he would "never get it because" I said, "it is coal land."

Q Do you know Thomas B. Forsyth?

A Yes sir.

45 Q How long have you known Thomas B. Forsyth?

A Oh, I have see him—just before he came up there

to take this land up, when he came up there first he came to my house and he told me Charlie Burdette had sent him up there.

MR. SPOONER: I object as hearsay and irrelevant and immaterial.

MR. TODD: Anything tending to show that the homestead entryman upon this knew this to be coal land is relevant, and any conversation that they had in regard to it is relevant.

MR. SPOONER: He is starting to tell what this man told him when he went up there.

MR. TODD: Well, that is carried out further until—

THE MASTER: (Interrupting) Objection overruled.

MR. TODD: While it may not be relevant and material, it ges into the rest of the conversation.

Q (Mr. Todd) Go ahead.

A Mr. Forsyth came to my house and he told me that Mr. Burdett—Charlie Burdett, from South Prairie, had sent him up to do some work, and he wanted to know if he could board there. I says, "Certainly," I says, "I am awful glad that you are going to do some mining work." And he boarded with me until he fixed the cabin up—the old cabin—he boarded with me until he fixed the cabin up, and then when he left I found that he came up there to homestead it. So I asked him, I says, "Why did you lie to me when you came up and told me you were sent up here to do some work on this property for the coal?" "Why," he says "I told you that," he says, "because if I had told you I was going to homestead it you would not have me to board."

46

Q Where did he tell you he was going to do work on the coal, on what section?

A Section 34.

Q For whom?

A He said Charlie Burdett had sent him from South Prairie.

Q Did he tell you what the work was to be that he was going to do there?

A Well, he said—well, I understood him to mean that he

was going to work—to do some work with the coal mine, he said.

Q Did you ever have any other conversation with him relative to the coal character of this land?

A Oh, when I found out what he was doing, I was done with him.

Q What was Forsyth's business around there prior to the time that he went upon this homestead?

A He used to come up there and fish, to fish in Green River, occasionally.

Q Do you know whether he has ever worked as a miner?

A Oh, yes.

Q Where?

A I believe he worked at South Prairie, Roslyn.

Q Do you know Ordin A. Olsen?

A I saw him, yes.

Q How long have you known him?

A Oh, I have known him twelve or fifteen years.

Q What has his business been during that time?

A Miner. He is a miner.

47 Q How near to this section has he lived during the past fifteen years?

A He lived at Kangley.

Q At where?

A He lived at Kangley, he worked at Kangley.

Q And that is on the section next to this one?

A Yes sir.

Q What work did he do at Kangley?

A He was a miner.

Q Did you ever have any conversation with him relative to the character of this land, at the time he homesteaded it or prior to the time he—

A (Interrupting) Well, he always appeared to be very shy with me.

Q You never talked to him then?

A No.

Q Do you know Thomas Spaight?

A Thomas Spaight?

Q Do you know Thomas Spaight?

A I am not acquainted with the gentleman, no sir.

Q Do you know Robert L. Barbee?

A Yes sir.

Q How long have you known him?

A Oh, I have known him about a year before he came up there to live. I rented him a house at Durham.

Q Where was he living at that time when you first know him?

A At Ravensdale.

Q What was he doing at Ravensdale?

A I think he was working in the mine and carpenter

48 on the outside too

Q How far is Ravensdale from this section?

A It is about five miles, I believe.

Q Did you ever have any conversation with Barbee relative to the coal character of this land?

A Yes sir

Q When was that?

A When he came up there to live, I tried to pursuade him not to go on it.

Q What did you tell him?

A I told him, I says, "Barbee, it is coal land." "Well," he says, "if I can get a filing on it, it will be all right, wont it?"

Q What did you tell him?

A "Well," I says, "you will have trouble, sure."

CROSS EXAMINATION.

Q (Mr. Spooner) Mr. Starkey, you remember going over this land last week with Mr. ——— a part of it with Mr. Smith and myself?

A Yes sir.

Q We started in, as I remember it, about the southeast quarter of the section?

A Yes.

Q Where the road runs by there?

A Yes sir. Yes, that is right.

Q There is a cabin there and quite a good sized clearing, isn't there?

49 A Yes

Q Now, that land where that cabin is, is bottom land, isn't it?

A Well, it is on the bottom, certainly.

Q Yes.

A It is not on a knoll.

Q No, when I am speaking of bottom land you know what I mean by bottom land, don't you?

A Yes, I understand.

Q As we followed up through the woods there, do you remember—did we go through an alder bottom there?

A That bottom we went through, sir, is on section 3.

Q Part of it.

A We went—

Q (Interrupting) Part of it on section 34, isn't it?

A We went pretty near on the line all the way up that road, pretty near on the line, as I told you, I says, "Here," I says, "we are walking on 3."

Q Do you remember when you and Mr. Smith left us and went off to the left there?

MR. TODD: To the right?

Q (Mr. Spooner) To the left?

A Yes.

Q Hunting for an outcropping?

A Yes sir.

Q That was on section 34, wasn't it?

A Yes sir.

Q Well now, part of the alder bottom that we followed up there was on 34 and part of it was on 3; isn't that true?

50 A You know where the road was, that road we followed up that hill?

Q Yes.

A That is pretty near the line. You see the line run—

Q (Interrupting) But that is not all of it on the line, because you went off clear to the left of it in order to get an outcropping on 34?

A Well, you know the fence, I showed you a line.

Q Yes.

A Well now, that fence was on the line and we were on the outside of the fence; we didn't walk—we didn't go—after we got away where that corduroy was, you understand—you know where we crossed the corduroy?

Q Yes.

A The corduroy as on section 3. Now, that road, when we struck the road after we got across the corduroy, the road where we struck it was on the line of the section.

Q You remember the second cabin we struck?

A Yes sir.

Q We went in under some—there was a trail there running through some bushes, do you remember that?

A Yes.

Q And there was a clearing there?

A Yes sir.

Q That land that was cleared there was substantially of the same character of the clearing down where the first cabin was, wasn't it?

A Well, it is swampy and wet, it is not—

Q (Interrupting) Comparatively level land—comparatively, I say, level land?

51

A Yes, but where the cabin was, as I showed you, after you go up there 200 feet you would find that tunnel and the hill begin to rise.

Q I am not trying to fight your testimony at all, Mr. Starkey, I simply just want to ask you these questions and have you answer the question I ask. Then, if you want to make any explanation, all right, but I am speaking about the clearing in which that second cabin stands. That is substantially the same kind of land and the land where the first clearing is, isn't it, as far as you know?

A Well—

Q As far as you can tell from looking at it?

A Yes, as far as I know it is.

Q Now, between the first clearing, down there on the corner of the southeast quarter, between that cabin down there and the second cabin it is not cleared, is it, there were only

those two clearings there, I mean, but I say between those two cabins and those clearings there is a lot of this timber?

A Yes, kind of timber—small timber.

Q Small timber?

A Yes sir.

Q And swamp—swampy land?

A Well, there is not any swamp until you cross the creek.

Q Now, there is no reason, so far as you know, why that small timber between the first clearing and the second clearing, if taken out of there, would not leave the character

52 of the land—the surface of the land substantially the same as these clearings, it is practically the same stuff, only it is not cleared, isn't it?

A I don't think this that is on the hill is as good land as this other.

Q I am speaking now of the shape of the ground, I mean the comparative levelness of it. You haven't struck the steep part of the section yet in there, have you?

A Well, after you leave that log cabin—

Q (Interrupting) I mean leaving it, going down, not up the hill, I am speaking now of the land between the two cabins, the first one we struck and the second one?

A Oh.

Q The two clearings?

A Well, yes, that is pretty level, yes.

Q Pretty level?

A Yes sir.

Q Then we went up over the hill whole you and Mr. Smith were hunting for that outcropping, and you met us up there at a third cabin?

A Yes sir.

Q Do you remember that?

A Yes sir.

Q There was another clearing, wasn't there?

A Yes sir.

Q That land there is substantially level where that clearing is, isn't it?

A There is a bench there but—well, I don't know much about the land, as I told you before.

Q I am not asking you to tell me about the quality of the soil, but merely as to the shape of it, whether it is comparatively level or not, that is all?

53

A Well, there is a level spot there, yes.

Q Now, do you remember we asked you whether there were any outcroppings and you said yes. You remember you started in to show them to us. Do you remember of it?

A Yes sir.

Q Do you remember up that path, in going up that road or path that you speak of, that you hunted up along that path to try and find the outcropping, do you remember kicking in the dirt at different places to try and find it?

A Yes sir.

Q And you didn't find it?

A No.

Q And then you and Mr. Smith went off down the hill?

A Yes sir.

Q And you did find something, didn't you, that had been uncovered?

A Yes sir.

Q That was the only place where you found any outcropping that time, wasn't it?

A Well, that was the easiest place I could show you, and I wanted to take you in the tunnel, but you didn't want to go to it.

Q You suggested that afterwards, if we didn't want to go further, but I am speaking merely about the outcropping, not the tunnel. As we went up you tried to find outcropping to show us, didn't you, on that road that we went up?

A Well, I had nothing to do it with only my foot, you know.

54

Q You tried to show it?

A You saw little bits of coal, didn't you, yourself?

Q I saw coal down on the road, for that matter. Now, let me ask you one or two questions in regard to the reasons

why you call this coal land. What do you mean when you say that land is coal land?

A Why, the coal is under it, that is what I mean by that.

Q Now, did you hear Mr. Corey's testimony?

A I was not paying any attention to Mr. Corey.

Q I didn't ask you how much attention you paid to it, I asked you if you heard it?

A No, I didn't, really I didn't hear it.

Q Well then, I will ask you the questions directly: When you went up there twenty-four years ago, or about twenty-four years ago, you found this tunnel there?

A Yes sir.

Q Which you say is about 50 feet, as near as you can judge?

A Yes sir.

Q And you worked some six weeks on it?

A Yes sir—six weeks on the section.

Q On the section?

A Yes sir.

Q On the entire section?

A Yes sir.

Q That tunnel and the evidences of some little openings are all there were on the ground by which you could see underneath the surface, wern't they—that tunnel and the

55 openings that you speak about, the little openings that you found in a clearing there were all that there was by which you could see underneath the surface, wasn't it?

A That is all I saw, yes.

Q That is all you saw?

A Yes. At that time.

Q What?

A At that time, yes.

Q Well, since that time what other tunnels have you driven?

A I have not driven anything.

Q Since that time what other openings have you dug?

A I have not dug any.

Q Well then, since that time what other openings have you seen that anybody else has dug?

A Look here, I haven't been examining it.

Q Well then we get back to the proposition that your statement that that is coal land is based, so far as any knowledge is concerned, upon what you saw in that tunnel, isn't it?

A That as I saw and that other, because, as I showed you when you were with me—I showed you how the coal laid, didn't I?

Q You told me. You didn't show me, because I didn't see it.

A I said, "This is the depth of it—the pitch of it." I said, "This is the strike, it runs pretty near east and west; the strike and the dip is to the north."

Q Well now, when you say this is known coal land, has been known as coal land—

A (Interrupting) Yes sir.

Q (Continuing) You mean that there is coal on it?

56 A Yes, there is certainly good coal.

Q Do you base that statement that it is coal land on any knowledge of the amount of coal in it, do you know how much coal there is on it?

A No sir, I don't profess to know.

Q The reason you call it coal land, then, is because of this prospect that you find on it and because there is other coal land around, that is the reason, isn't it?

A Why, I tell you the only reason is this: I have worked on it and I have saw it and that is why I say it is coal land.

Q But you have only worked in that one—it has only been opened up in the place you mention, hasn't it, that tunnel is the only prospect?

A Them is the places I worked, is all.

Q Aside from that you don't know, do you?

A No, I don't know.

Q Do you consider that you are justified in stating that that is coal land—known coal land, simply because of a 50 foot tunnel that you worked around?

A Well, you see you must go by the strike and the pitch of the vein, and of course that is all the best men of the United States does.

Q Have you ever met or come in contact with a pitch and strike that was as good as this, that petered out after they—

A Never, I never did.

Q You never did?

A No sir.

Q What do you know about the Kangley mine?

57 A I don't know anything about the Kangley mine.

Q How close is it to you?

A It is a mile, a little over a mile.

Q Don't you know as much about it as you do about this mine which has never been opened up at all?

A I know I worked at Kangley myself a little bit.

Q And how long has it been closed down?

A Oh, I could not tell you that either.

Q What?

A I could not tell you.

Q Well, it has not been operated for some time, has it?

A No sir.

Q You are watching a mine at the present time, aren't you?

A Yes sir.

Q Called the Durham?

A Yes sir.

Q How much work has been done on that?

A How much?

Q How much? Are they working on it now?

A There is thirteen men working on it right now.

Q What are they doing now?

A They are working.

Q How long have the people who have it, for whom you are working, had it?

A Oh, I could not tell you that. I know how long I have been there.

Q Are they turning any coal out of there, are they doing any business with that mine?

A When they get ready they will turn some out.

Q That is not what I am asking. I am asking

57 whether they are or not?

A No sir.

Q No.

A No.

Q Do you know the Green River mine, what is known as the Green River mine, in section 8?

A I know where section 8 is, yes.

Q Do you know where the Green River mine is?

A Yes sir.

Q How far is that from where you are now and from this land?

A It is about four mile, I guess.

Q About four miles?

A Yes.

Q Do you remember how long ago the Green River mine was opened up?

A I don't think it ever was opened up.

Q You don't think it was ever worked at all?

A I don't think it was ever opened up, no sir. There was some prospecting done on it. Is that what you mean?

Q I mean prospected.

A Well, that is a different thing.

Q Well, you are right about that. Do you remember how much it was prospected, how extensively?

A No, I can't tell how much work they did there, but they done some work.

Q They did a good deal of work, didn't they?

A Well I don't know how much they did do.

Q Have you ever seen it?

A I was down where the shaft, but I never was down the shaft. One day I came over after a man they call Blellien. That is not anything about the work. And that is all I know about it. I don't know what was found on section 8 or anything about it.

58

Q You know it is not working now, don't you?

A Yes sir.

Q Do you know of any homesteads up there in that vicinity—

A (Interrupting) I know—

Q (Interrupting) Wait a minute. Do you know of any

homesteads up there in that vicinity, on which there is any showing of coal?

A Well—

Q (Interrupting) How about section 28?

A Yes, there is coal on section 28.

Q That is a homestead, isn't it?

A I don't think so.

Q Well, are there any homesteads?

A Well, I don't know whether there is any homesteads on 28. They are going to open a mine there, so they say.

Q Well then, to revert to my original question: Are there any homesteads that you know of up there on which there is any voal showing at all?

A Well, not to my knowledge.

Q Are there no homesteads up there in that country at all?

A Yes, there is some homesteads up there, yes.

Q And are there no homesteads up there in which there is any coal showing at all?

A If you will just listen, I will tell you the men as I know has homesteaded. There is Walters on Kangley—

59 Q (Interrupting) Well, is there any coal on the homestead showing at all?

A I could not tell you that either. I don't know.

Q You don't know?

A No sir.

Q Well, mention the others?

A There is Walters and Peter Brown.

Q Is there any coal showing on his at all?

A Not as I know of. I never saw any.

Q Are there any others that have homesteads on which you know of any coal showing?

A Not as I know.

Q I want you to answer this question simply from your knowledge, now, not what you think, not what you guess, but what you know: So far as you actually know, is that land any more valuable or as valuable for its coal as it is for the timber on it? I am speaking now of what you know?

A Well, I will tell you, the timber on it would never pay to cut it to ship, that is my opinion.

Q Now, I want you to bear in mind, in answering this question, that I am asking you about something you have seen there. You have seen the land and the timber and you have also seen this tunnel, 50 feet. Now, so far as you know—your actual knowledge goes, of what there is in the land—not what you think there may be, but what you know there is on the land, could you swear that that land was more valuable for the coal on it than for the timber on it?

A Well, my opinion is—

Q (Interrupting) I am not asking for your opinion.

60 A Well—

Q I am asking, from your knowledge, I am speaking of the fact that you have seen this timber, you have seen the land, the amount of flat land there is in it, such as it is, and you have also seen this opening—the only evidence that you have of the coal there. Now, I am asking you, from what you have seen and what you know, would it be fair and can you conscientiously swear that land is more valuable for its coal than it is for the land itself and the timber on it?

A Well, I would take—

Q (Interrupting) I am not asking what you would take.

A Well, I will tell you—

Q (Interrupting) I am not asking what you would take, I am asking what you know. From what you know, can you swear that?

A I have told you what I know about it.

Q Well, can you conscientiously swear that without knowing more about the prospect?

A I will just leave that to the court to decide. I have told you all I know about it.

Q This is a matter you can't leave to the court to decide, or anyone else. I am satisfied, from your testimony, and from what I saw of you the other day, that, while you are a very enthusiastic mining man, that you are probably not radical about this property or any other, you have mined long enough to know what sources of information are safe to base a judg-

ment about property on, and what are not. Now, I simply want to ask you, from the knowledge that you have,

61 which consists of this opening, this 60 foot tunnel, with the showing there is on it, from that merely, together with your knowledge of the land, that is, what you can see there, with the timber on it, whether or not you believe that you could conscientiously swear, not that you thought, but could conscientiously swear that the land was more valuable for the coal than it was for the land and the timber?

A Well, I would—now, for me to swear that the coal—my opinion is that the coal runs there and I would be willing to pay coal price for it, under the circumstances and the way it looks.

Q All right.

A Yes sir.

Q Now, I have let you give your opinion.

A Now, that is just what I would do.

Q Now, answer my question. Would you be willing to take the responsibility, with the chances there are in regard to these things—you can't ever be absolutely sure—would you be willing, being a conscientious man, to swear, not what you think, what the chances are, but that as a matter of fact the land is more valuable for its coal than it is for its timber and the land? I know what you think, but I am asking you whether you could swear that as a fact—would you want to swear to that, Mr. Starkey?

A I would be willing to pay coal price for it.

Q Now, you are answering giving your opinion.

A I don't wish to answer the question.

Q All right.

62 A I have said—what I have said—I have said as to the coal, is true, and I have worked on it and I know it is there.

Q You don't want to answer the other question—is that the case?

A That is the way it is, just the way—

Q (Interrupting) You don't wish to answer that question—is that what you say?

A I don't wish to swear that the coal—that the coal is—or land is worth more for coal than anything else, for I don't know what the other is worth; but you see I say the coal.

Q All right, Mr. Starkey.

A I told you and Mr. Smith when you were there, I says, "When you got the land you got it dirt cheap."

MR. SPOONER: Never mind. I think that is all.

REDIRECT EXAMINATION.

Q (Mr. Todd) On which quarter section is this clearing that you have spoken of?

A There are three clearings.

Q Well, the largest clearing that you spoke of?

A Why, it is on the southeast quarter.

Q Do you know which one of these claimants' land it is on?

A Yes sir.

Q Which one?

A Turner's; that is the biggest clearing.

Q That is where the swamp land is?

63 A Well, no, there is not—where the clearing is there is not any swamp land there, is there?

Q That is Turner's clearing?

A Yes sir.

Q How big is that clearing?

A Well, I could not tell you that either.

Q Well, is it a large clearing or a small clearing?

A Oh, it is small.

Q What is the next clearing, whose is that?

A Forsyth's.

Q Is that higher up?

A Well, he runs up very near to where that other coal is, close.

Q How near to the top of Sugar Loaf?

A Well, the way he has took his land, he has took it a mile long, you see, and a quarter of a mile wide. So has Turner.

Q They are both on the east half of the section?

A Yes sir.

Q Where is his cabin, towards the middle part of the section?

A Forsyth's?

Q Yes?

A It is pretty near—it might be about 200—from two to three hundred feet from the east and west line.

Q That is on one of the clearings you mention?

A His house is in about 200 feet of where the tunnel is.

Q Of the tunnel that you worked on years ago?

A Yes sir, only the tunnel is west.

Q How big a clearing is his?

64 A Oh, I don't know hardly, it is very small, very small.

Q And where are the other clearings on the section?

A Well, Barbee's is way up on the hill; that is on the east. This is on the west quarter, Barbee's is.

Q Is it on the northwest or southwest quarter, do you remember?

A Southwest quarter I think.

Q How big a clear is that?

A He has got a right smart clearing.

Q And Olsen's clearing, where is that?

A Olsen is away on the north end, the northwest—

Q (Interrupting) How much of a clearing has he got?

A Oh, there is a little there, I could not tell you how much.

Q Now, upon what experience and observation do you base your opinion that this is coal land?

A That is I have worked on it.

Q I mean as to what you saw and what you know to make you believe that it is coal land?

A Why, there is that foot wall and the hanging wall, the sand rock; that is all I can give, as coal land.

Q What experience have you had to base your statements on, what experience in mining?

A Well, I have always mined in coal.

Q In that same kind of coal?

A Well, in different kinds, you know.

(Witness excused.)

An adjournment was here taken until two o'clock this afternoon.

65 AFTERNOON'S PROCEEDINGS,

October 14, 1909.

F. G. SMITHERS, produced as a witness on behalf of PLAINTIFF, having been first duly sworn, testified as follows:

Q (Mr. Todd) Please state your full name?

A F. G. Smithers.

Q What is your residence?

A Renton.

Q How many years have you lived in Renton?

A About forty-five.

Q You were born in Renton, were you not?

A Yes sir.

Q Are you acquainted with section 34, which has been testified to here?

A Yes sir.

Q How long have you been acquainted with that section?

A I think the first time I was on section 34 was in 1883 or 4.

Q How often after that?

A Well, off and on every year up until about twenty years ago.

Q Were you on all parts of the section?

A Yes sir.

Q On all quarters of the section?

A Yes sir.

Q What is the character of the surface of the land?

A Well, it is some flat land—

MR. SPOONER: (Interrupting) Objected to as irrelevant and immaterial.

66

THE MASTER: Objection overruled.

A There is some flat land and hills and some little canyons —small canyons and swamp on the land.

Q What part of the section is suitable for agriculture?

A Some places all over the section you might raise a little on. I would not consider it agriculture land at all.

Q Why not?

A Well, there is not enough of it in one body, I don't think, not suitable for agriculture.

Q What kind of timber has it on it?

A Mostly small timber—coal timber, some cedar and fir.

Q Is there any hill on it or peak of any kind?

A Yes sir.

Q What peak is on it?

A Sugar Loaf.

Q How high a peak is that?

A Well, I would judge anywhere from three to five hundred feet, something like that; I don't know exactly. I have been on top of it, chasing around it.

Q When you first went on the section had there been any prospecting there for coal that you know of?

A Well, when I first went onto it I don't remember seeing any coal on it; there was a cabin there and some clearing there and a stable.

Q What did you see subsequent to the first time you went on it?

A Well, I saw one place what they called the slope, and there was a little tunnel down on the creek. I would
67 not know what quarter it was on.

Q How many tunnels have you seen on that?

A That is all I ever saw.

Q Did you ever see any coal taken out of it?

A I never saw it took out of it. I have seen the coal burned there, is all.

Q Where did you see the coal burned that was taken from it?

A In the cabin.

Q How long ago was that?

A About twenty years ago, about the last time I was up there, I think.

Q State whether you know what the general reputation was in that vicinity as to the character of that land?

A It was considered coal land.

Q How long ago was that?

A Well, ever since 1884, to my recollection, always considered it coal land.

Q How far is that from Renton?

A Twenty-three or four miles, I think somewhere along there.

Q How did you use to get in there at that time?

A We had an old trail that ran from Renton through North Prairie and Meridian Prairie, and a trail came in from Kent across Meridian Prairie; that is the only way of getting there when I went in there first—no wagon road.

Q Do you know Zachriah Turner?

A Yes sir.

Q How long have you known him?

68 A About twenty years.

Q What has he done since you have known him, what has been his occupation?

A When I first knew him he was—I think he was—I would not be positive whether he was mining coal at Newcastle or not; he was living there; when I got better acquainted with him he was working in a store at Franklin.

Q Whose store?

A The Oregon Improvement Company.

Q When was that?

A Well, about nineteen or twenty years ago.

Q That was at the store at the Franklin mine?

A Yes sir.

Q How far is that from this section?

A Six or eight miles, I should judge.

Q Could you state how generally this section was known as coal land in that vicinity at that time?

A Well, generally known.

Q Well, to what extent, how far around there?

A Well, Newcastle out there, thirty or forty miles in that direction.

Q You say you have seen that coal used that was taken out of it?

A Yes sir.

Q What kind of coal was it?

A I don't know what you would call it, but fair burning coal; it burned in an open fire.

69 CROSS EXAMINATION.

Q (Mr. Spooner) Mr. Smithers, how large an area —just approximately how large an area around in the general vicinity of this section is generally known as coal lands, I mean in that part of King County, not this particular section really, but generally around that vicinity?

A Well, it is about thirty miles from Newcastle, and I think it is generally known all through there; further up into there, there was no country the other side of there in those days.

Q What?

A There was nothing the other side of there, that is, south of there, in those days; there was no mines developed on the other side of Green River, that I knew of—the Franklin, Black Diamond.

Q In a general way that country, for quite a radius up there, then, has been for a long while known as a coal country?

A Yes sir.

Q Do you know of anyone who has any homestead up there in that country at all?

A No sir, I don't.

Q You don't know what homesteads there are in that country?

A No sir, because I have not been in there for eighteen or twenty years.

Q What relation do you sustain or did you ever sustain to this section 34?

A Filed on it once.

70 Q You filed on it once?

A Yes sir.

Q When was that?

A Well, I ain't positive now whether it was before 1897, or afterwards.

Q Was it surveyed at the time you filed on it?

A I think it was.

Q How many times did you file on it?

A Filed once.

Q Once?

A Yes sir.

Q Did you file on it for yourself?
A I did.
Q What did you file on, what part of it?
A I don't remember now.
Q What?
A I don't remember what quarter I did file on.
Q You don't remember what quarter you filed on?
A No, I don't. It is long ago.
Q You did not follow up your filing?
A What?
Q You did not follow up your filing at all?
A I don't understand your question.
Q You did not follow up the filing that you made?
A No, I didn't.
Q You let it go?
A Yes sir.

71 REDIRECT EXAMINATION.

Q (Mr. Todd) Why did you let the filing go, Mr. Smithers?
A Well, at the time after a year was up I didn't feel able to file on it.
Q Why didn't you feel able?
A Well, financially.
Q What?
A Financially.

(Witness excused.)

DANIEL BOYLE, produced as a witness on behalf of the PLAINTIFF, having been first duly sworn, testified as follows:
Q (Mr. Todd) Please state your full name?
A Daniel Boyle.
Q Where do you live?
A At Occidental.
Q How far is that from this section 34?
A About four miles.
Q What is your occupation?
A Well, I used to dig coal. Now I am working in the bunker.
Q Where did you dig coal?

A I dug coal all over King County and Pierce, in
72 my young days.

Q How long have you lived in—how many years is that?

A I have been in King County here and Pierce for thirty-two years—thirty-three years.

Q Are you acquainted with this section 34?

A Yes sir, thoroughly.

Q How long have you been acquainted with it?

A I have been there—I have been—34—in '81.

Q What did you do there at that time?

A Well, I was not doing nothing but just walking over it.

Q When did you go on it next?

A In 1883.

Q What did you do there then?

A I found some coal in 1883, cropping out.

Q Then what did you do?

A Well, about two years afterwards—well, just two years afterwards I drove a tunnel on those veins—helped drive it.

Q Who were you working for then, yourself?

A No sir, I was working for the Oregon Improvement Company I think, I am not sure.

Q On what part of the section did you drive a tunnel?

A I drove a tunnel on—well, not myself, in company with others.

Q Yes.

A We drove two tunnels on the northwest quarter of 34. That was the first work that was done there.

Q What did you find when you drove those tunnels?

A Coal.

Q What kind of coal?

73 A The best kind of coal, about the best coal in the country.

Q How many veins of coal did you find?

A One. There was only one vein there, but there was—it was opened in two different places.

Q What other tunnels were driven there to your knowledge on the section besides those on the northwest quarter?

A There was a tunnel drove on the southeast quarter. Then the—

Q (Interrupting) How long after the tunnels were driven on the northwest quarter was that?

A About a year afterwards, I guess.

Q Were you there when that tunnel was driven on the southeast?

A Yes sir.

Q What did you find?

A Coal.

Q What kind of coal?

A Well, it was not quite so good as the coal on the north side of the section. It was pretty fair coal.

Q Did you determine how the veins run there?

A Yes sir.

Q How do they run there?

A They run east and west, partly east and west, a little north of east.

Q Now, did the tunnel you drove on the southeast quarter run into the same vein as the tunnel which you drove on the northwest quarter?

A No sir. Pretty near a mile between them.

Q Pretty near—

A (Interrupting) Pretty near a mile. The north vein is away in the north part of the section, and the south vein is on the south part, close to the line.

74

Q The general direction of those veins is east and west, you say.

A Yes, partly east and west.

Q Were there any other tunnels driven or slopes made on the section?

A Not in early days. These were the firt.

Q What others have been made since, to your knowledge?

A Well I have not been on the section now for this last eighteen years. There was quite a good many men worked there afterwards.

Q How many men worked there in 1883 when you drove the first tunnel?

A There was four of us then.

Q How many were there the next year when you drove the other tunnel?

A Well, there was seven or eight of us there then part of the time.

Q What is the character of the land as to being hilly or flat—of the section?

A This mountain they call Sugar Loaf is pretty near in the center of the section, it takes in a part of each quarter.

Q Is this a map which you drew?

A That I drew?

Q Yes, did you draw this?

A No sir.

Q On what part of the section is there level land?

75 A On the east part of the section there is some level land.

Q Do you know how much there is of level land there?

A No, I could not swear to it. It is quite a piece there on the east side of the section.

Q When did you first learn that this was coal land?

A In 1881.

Q How general was that known about in that vicinity?

A Well, it was known by me and another man, we were both walking over it.

Q How generally known was it after that, if you know?

A There was nobody in the country then only just a few men that was sent up from Newcastle there to hunt for coal, that the Oregon Improvement sent up there, and there was nobody in the country only just a few men that were sent up there.

Q When were the other mines opened up in that vicinity?

A I guess Franklin was the next. No, Black Diamond was the next, the first mine that was opened up there. That was opened, I guess, about twenty-five years ago.

Q That would be just shortly after you drove that firt tunnel then?

A Yes, shortly after, yes. They were prospecting at the Diamond in 1881.

Q When were you last on this section, do you remember?

A On 34?

Q Yes.

A I was not there for eighteen years.

Q Well, at the time you were there last how generally known was it throughout that vicinity that this was coal land?

A Well, everybody knew it then—long before that, everybody that was up there, all the old settlers.

76

Q How many mines are there in that vicinity that were operating?

A Now?

Q About 1890?

A 1890?

Q Yes, or about eighteen years ago when you were last on that land?

A Why, there was a whole lot of mines there.

Q Do you mean to say it was generally known among the mining men up there that this was a coal section?

A Yes sir.

Q What mines have you worked in up there?

A I have worked in a mine called Durham and I have worked in a mine called Kangley and I worked in the Occidental and I worked in Green River coal mine and the Sunset coal mine. I have worked in them all pretty near.

Q The Occidental is at Palmer?

A No, it is below Palmer a mile, one mile below Palmer.

Q That is where you are working now?

A Yes sir, I am working outside in the bunker.

Q Did you ever know Zach Turner?

A Yes, I am thoroughly acquainted with him.

Q Where did you know him?

A I knew him first at the Franklin, clerking in the store, about twenty-five years ago.

Q Where else did he work besides the Franklin store?

A Well, he was doing business that time for the Oregon

Improvement Company, and then he started a store himself afterwards at Palmer, of his own.

77 Q How far is Palmer from this section, section 34?

A About three mile.

Q How long did he run the store at Palmer?

A Well, about ten or twelve years, more or less.

Q Did you know James B. Forsyth?

A Yes sir.

Q Where did he work up there?

A He didn't work any up there, that I know of. He worked at South Prairie.

Q At the South Prairie mine?

A Yes sir.

Q How long did he work there?

A I could not tell you, sir.

Q Did you ever know him up in the vicinity—living in the vicinity of this section?

A Yes sir.

Q Where did he live?

A When I knew him up there he was living on the section.

Q What year was that?

A I could not tell you the year, sir, but—

Q (Interrupting) I mean about how long ago?

A About eight or nine years.

Q Ago?

A Yes sir—I think.

Q Well, did you ever know him living in that vicinity before he lived on this section?

A No sir.

Q Did you know Robert L. Barbee?

A Yes sir.

Q Where did you know him?

78 A I never knowed him until I knowed him on the section.

Q Did you know Ordin A. Olsen?

A That is a man I never knowed.

Q Have you been on the section since these men lived there?

A No sir.

Q But you knew them, knew they were living on the section?

A Yes, I knew they were living on the section.

Q Did you ever have any conversation with them in regard to the coal character of the land?

A Well, no. Well, let's see—had a talk with Turner several times about his place, but the others I didn't bother talking to.

Q What was the talk with Turner?

A Well, talking with him about the piece of good land he had and what he had cleared, one thing or another.

Q I mean did you talk about the coal character of it?

A We did not talk much about the coal.

Q What is the character of the timber on this section?

A Timber? Don't amount to anything only just a little piece on the northwest quarter.

Q Well, could you state with regard to the agricultural land on the section? I think I asked you that before, probably. Did you state whether the land is suitable for agriculture or not?

A No, there is a piece on the east side of the section, of pretty fair land, but the rest of it don't amount to much.

79 CROSS EXAMINATION.

Q (Mr. Spooner) You gave a list of the mines that you were working in at different times eighteen years ago. What were those mines again, just mention them slowly?

A What I am working now?

Q No, you said you were working in mines since eighteen years ago when you were first on that—or the last time you were on the section. What mines have you worked in?

A Well, Durham was the first mine after I worked Sugar Loaf.

Q Is the Durham mine being operated now?

A No sir, not for several years.

Q What was the next one?

A Kangley.

Q Is that being operated now?

A No sir, not for several years.

Q And what was the next one after that, that you worked in?

A Sunset.

Q Is that being operated now?

A Well, it has been idle for a short time. It is starting up again.

Q And what was the next one—Green River—you spoke of Green River?

A Green River, yes.

Q Is that being operated?

Q Yes, right along.

Q Are you sure about that? Mr. Starkey said it
80 was not being operated?

A Yes, that is one of the best mines they have go up there—Green River mine. I will explain it to you. There was a man named Nolte used to run this mine, and there was an Alaskan company bought it about six months ago and he gave it the name of Green River mine.

Q Is that the Green Riven mine you have reference to?

A Yes sir.

Q I was thinking of the old Green River mine on section 8.

A And there never was a mine there, just prospect holes. I worked there myself for years. Never was a mine there, sir.

Q There is coal there, though, isn't there?

A Yes, there is coal there, yes sir.

Q How much work was done there?

A Oh, there was quite a little. I could not exactly tell you how much.

Q How much of a tunnel was there?

A Well, there was sinking slopes and drifts, and they worked there and they worked there a good many years trying to find the coal. They did find coal, but it didn't amount to anything.

Q What sized vein do they find there, do you remember?

A Well, there is three or four veins there, different sizes.

Q How large were they?

A Well, I guess the largest one was about five or six feet, and the smallest one was about two feet and a half.

Q How far in on it did they go—on the vein, do you remember?

81 A They did not drive much of a tunnel there—

Q (Interrupting) They did a lot more work there than they did on 34—than was done on 34?

A Yes sir, lots more—they spent more money there, but they didn't find near as good coal.

Q And they didn't develop it at all?

A No, never.

Q Whereabouts is the tunnel that you speak of on the southeast quarter, whereabouts with reference to that cabin, or where was it when you were last down there eighteen years ago?

A It was on the—it was drove on the east quarter, on the west forty, the west forty of the east quarter.

Q The east forty?

A No, on the west forty, the east quarter.

Q Well, that is right near the corner then?

A Yes, near the half mile post.

Q How long since you have been on there?

A About eighteen years ago since I have been on Sugar Loaf.

Q You don't know whether there is any evidence there of a tunnel now, or not?

A No sir, I don't.

Q How much of a tunnel was it?

A Oh, it was—the tunnel, I could not say how long it was, exactly, but it was quite a piece.

Q It was not as long a tunnel as the other one?

A No.

Q The other was about 50 feet?

A The other one is more than 50 feet.

82 Q Well, I am simply quoting Mr. Corey and Mr. Starkey; they said it was about 50 feet. That is wrong, is it?

A It is longer than that.

Q You say that when you went up there and drove the tunnel you were working for the Oregon Improvement Com-

pany. You say you think so. Why did you state you were working for the Oregon Improvement Company?

A We were sent there by the Oregon Improvement Company, from Newcastle.

Q How do you know you were?

A Mr. Williams sent me there.

Q Did Mr. Williams tell you that the Oregon Improvement Company was sending you there?

A Yes—no, he didn't.

Q How do you know it?

A Well, they paid us.

Q How do you know they paid you?

A Well, I could not swear to it. We thought our money was coming from them.

Q But you didn't know who sent you up there, did you?

A Well, Mr. Williams sent me up there.

Q Mr. Williams sent you up there, but you don't know that the Oregon Improvement Company sent you up there, do you?

A No, I could not swear to it. He is superintendent.

Q You say it is coal land. What do you mean by coal land, land on which there is coal?

A Any land that has lots of coal on is coal land, I should think.

Q Any land that is what?

83 A That there is lots of coal on it.

Q How do you know how much coal there is on this land?

A Well, I have seen quite a bit of coal there myself.

Q You have seen two tunnels, one 50 feet, or about that, and one less. Have you seen anything else?

A No, not in early days I didn't.

Q Well, how do you know how much coal there is on that land?

A There is a good bit of coal in those two veins.

Q What?

A There is a whole lot of coal on them two veins.

Q Do you know how far those two veins go?

A I could not swear to it.

Q You don't know how much coal there is on there. You think you know, but you don't know, do you?

A Well, no, I could not swear to it.

Q Well, don't say or try to say. Would you say it was more valuable for coal land than for any other purpose?

A Of course I would.

Q Why would you say that?

A Well, I have got my own opinion.

Q I know, but why would you say that, if you don't know how much coal there is on it?

A Well, I don't know how much coal there is on it.

Q You know how much timber there is on it, don't you?

A The timber don't amount to anything.

Q I understand you to say that before. But you know how much there is on it, don't you?

A Yes, pretty near.

84 Q In answer to a question of Mr. Todd's, a moment ago, you said that the timber didn't amount to anything except on the northwest quarter?

A Yes—

Q (Interrupting) Listen a minute. You say on the northwest quarter. The northeast quarter a large part of that hill is on. Do you want to tell the court that that hill is not covered with timber all over it?

A No sir.

Q It is not covered with timber?

A No sir, there is no timber on the hill at all.

Q No timber on the hill at all?

A No, it is nothing but rocks on top of the hill.

Q Are you sure you remember these quarters correctly? I ask you this because I saw this only last week. Now, just be candid.

A On the top of the hill is no timber.

Q Does not this hill run up so that the top part of it is in the south part of the northeast quarter of the section? Is not the whole slope of the hill clear up to the top of it cov-

ered with timber in the northeast quarter and in the north half of the southeast quarter?

A Can I explain myself?

Q Certainly.

A Well, the second growth timber they don't call it worth anything, not that timber.

Q I am not asking how much it is worth, I am asking the question of fact whether there is timber on those quarters or not?

A Well, small second growth timber.

Q I didn't ask you what kind. You said it was 85 timber merely on the northwest quarter?

A Yes—good bunch of timber there on the northwest quarter.

Q There is timber on the northeast quarter too, isn't there?

A Yes, timber, but it is small.

Q But it is timber?

A It is timber, yes.

Q And it is thickly timbered down there, isn't it, except where those clearings are made, isn't it, on the side of that hill?

A Yes.

Q You say that at that time—well, in 1881 you say that only you and another man knew anything about the coal on there so far as you knew, but that about eighteen years ago everyone around there knew that it was coal land?

A Yes.

Q Who else was there eighteen years ago, and where were they? It was not all settled up; it is not all settled up yet. How many active mines were there and how many people were there and where were they located around there eighteen years ago?

A Well, there was Kangley and Durham—Kangley and Durham, that was two mines that was working in them days up there.

Q What else?

A That is the only mines that were opened right there, is Kangley and Durham—close to 34.

Q Isn't it a fact that these tunnels that you drove
86 in there simply disclosed a prospect, they made merely a coal prospect out of that, as to what there is in there nobody could tell, could he, without going in on it?

A Well, I put out over 60 ton of coal myself on one of the prospect holes.

Q You did what?

A I dug over 60 ton, myself—that is, myself and another man wheeled it out with a wheelbarrow.

Q 60 tons?

A Yes sir.

Q How long were you working there at the time you did that?

A That was about—that I guess was in 1886.

Q How long were you there working in 1886?

A Oh, I have been there off and on ever since 1881.

Q No, I am speaking about the time you said you took the 60 tons out of there in 1886?

A Yes.

Q How long were you there? Did you mean that you took this 60 tons out in the year 1886?

A Yes sir.

Q And how long were you working there in 1886, about?

A Oh, I could not tell you; we were several months there working.

Q You were?

A Yes.

Q And where did the coal go?

A There in a pile. It is there yet, I guess.

Q But simply coal that you took out of there—

A (Interrupting) Yes sir.

Q (Continuing) —in driving the tunnel, you mean?

87 A Yes; wheeled out with a wheelbarrow and dumped outside, and it is there yet, part of it.

Q You mean coal and dirt together?

A Coal and dirt together?

Q Yes.

A Well, it was good coal.

(Witness excused.)

SIDNEY J. WILLIAMS, produced as a witness on behalf of PLAINTIFF, having been first duly sworn, testified as follows:

Q (Mr. Todd) State your full name?

A Sidney J. Williams.

Q Where do you live?

A Renton.

Q Where were you born?

A Renton.

Q What position did your father occupy?

A He was superintendent at Newcastle for some years prior to 1883.

Q For the Oregon Improvement Company?

A Yes sir.

Q What profession do you follow?

A Attorney-at-law.

Q Have you ever been upon section 34 mentioned here?

88 A I have.

Q When were you first there?

A I went there about—I think it was about twenty-two years ago, twenty or twenty-two years ago; I don't remember exactly.

Q How often were you there since that time?

A I was there practically every summer up until the last —for every year up to the last four or five years and I have only been there twice in the last four or five years.

Q Just state what the character of the land is there on the section?

A The general character is rough, with three or four openings or clearings on it. Some bottom land, swamp.

Q Which side of the section is the bottom land?

A It is on the west side, the west half of the northeast quarter.

Q The west half of the northeast—

A (Interrupting) Part of that.

Q What is the character of the timber on the section?

A Why, it is timber that is generally suitable for mining timber, small timber, some alder, vine maple, fir, cedar.

A Did you ever make any inspection to determine whether the land had coal on it or not?

A Yes, I have been in the tunnels that were made there.

Q How many tunnels were there on the section?

A Two tunnels and one extension or projections of a tunnel, and slope.

Q Where were those, the tunnels and slope?

A One was on the—I think it is the west half of the northeast quarter, in that vicinity, right on the line of section 33 the tunnel went in.

89

Q Where were the others?

A The other was on the far end, the opposite end of the section from there. I don't remember just exactly what quarter it was.

Q Did you ever see any coal taken out of there?

A I have.

Q What was the character of that coal?

A Well, it was a soft coal, bituminous coal.

Q Well, state whether it was of good or bad quality?

A Good coal.

MR. SPOONER: Objected to as incompetent.

A Good coal.

MR. SPOONER: Judge Green, I objected to that question as incompetent, and Mr. Williams is a lawyer who has been up on this section quite a number of times, and Mr. Todd is asking what quality the coal was.

THE WITNESS: Mr. Spooner, I did not intend—

MR. SPOONER: (Interrupting) I object as incompetent.

THE WITNESS: (Continuing) To answer over your objection.

MR. SPOONER: I know you didn't. It does not make a particle of difference, it is not a jury case.

MR. TODD: I should have qualified him.

THE MASTER: He should show his qualification as an expert.

MR. TODD: I will withdraw the question, for that matter. I may prove it by other witnesses.

Q (Mr. Todd) Were you up there after these homestead entrymen made their entries on the land?

A Yes sir.

90 Q Which of them did you meet up there, if any?

A Forsyth.

Q With whom did you go up on the land?

A Julius Clinker.

Q When was that?

A I think it was about seven or eight years ago; I don't remember exactly when it was.

Q Was it before or after they made their final proof?

A Before they made their final proof.

Q How long after the time they had made application—their entry upon it?

A Immediately.

Q What part of the section were you on when you met Forsyth?

A I think I was on the west half of the northeast quarter.

Q Is that his part of the section?

A His is the west half of the northeast quarter and the west half of the southeast quarter.

Q Did you meet any of the other entrymen at that time?

A I did not.

Q What took place?

A Why, I went on to go on to the tunnel and I met Mr. Forsyth and he told me not to come any further, and I told him I was going to the tunnel. He says, "You can't go to the tunnel," he says, "if you go any further I will shoot you." He had a gun in his hand at the time, and I kept on walking towards him, and he told me not to come any further, he would shoot me. So then I went back off the section.

Q Did you tell him for what purpose you wanted

91 to go on the land?

A I came there to go where the coal was, the tunnel.

Q Did he say anything about the coal?

A He told me he would not let me go there.

Q Did you at any other time meet any of the other entrymen there?

A No, I never met any of the other entrymen. I knew Mr. Turner, I knew him well, but I never met him on the section.

Q How long have you known Mr. Turner?

A Twenty years.

Q What has been his business during that time?

A He was first clerk in the store at Franklin, when I first knew him, and afterwards ran a store at Palmer.

Q How near are those places to this section?

A About six miles. It is about four miles in a direct line from Franklin to the section. It is about four miles from Palmer, about six miles from Franklin, to the section, by trail.

Q For whom was he working at Franklin?

A. Working for the Oregon Improvement Company.

Q The Oregon Improvement Company is a company that owned various mines around there?

A Yes, at that time.

Q For whom was he working at Palmer?

A Himself, he had a store there.

Q Was there a mine at Palmer, or near there?

A There is a mine at Occidental, near there.

Q Did you know any of the rest of these other entrymen?

A No, I only knew Mr. Forsyth and Mr. Turner.

92 Did you know Mr. Forsyth prior to the time you met—

A (Interrupting) Yes.

Q Do you know where he worked?

A He worked in South Prairie. That is the Burnet mine. It is near South Prairie.

Q Do you know in what capacity?

A He worked there as a miner.

CROSS EXAMINATION.

Q (Mr. Spooner) You filed on this land, did you not?

A Yes sir.

Q On what portion of it?

A I don't remember the technical description that I filed on.

Q Was it on a quarter section?

A Yes sir. I think, if I remember exactly, it was the same—part of the same that Mr. Forsyth filed on, that is, it was the part that the tunnel was on that I filed on.

Q That is the part that the—

A (Interrupting) The—

Q (Continuing) —first tunnel that you mentioned is on?

A Yes; where that slope is also.

Q The northwest quarter, I think.

A Yes.

Q Did you file on that quarter section alone?

A Yes sir.

Q Well, I don't mean were you alone in filing on

93 that particular quarter section.

A Yes sir.

Q But did you file on that quarter section while others were filing in conjunction with you, filing on other quarters on that section?

A When I made the filing and made the tender of the money, I filed alone at that time.

Q What year was that?

A I don't remember the year. It was about—

Q (Interrupting) '96 or -7?

A I think it was, about; I don't know; the records show the filing. I don't remember.

Q It was shortly after the land was surveyed, wasn't it?

A I don't remember just exactly when it was, but the record shows. I made my filing and I made my tender of the money to the office here.

Q Any way you filed on it before—what was the condition, at what stage were these homesteaders in when you filed?

A They had just filed.

Q They had just filed?

A They had filed on it also, but hadn't made their final proof.

Q Did you keep your filing good?

A Yes sir, I made a tender of the $3,200 to the Land Office.

Q Then you contested their filing, did you?

A No, it didn't go any further. They refused to accept my money, the Land Office here it was more valuable for other purposes, and gave me back my money.

Q And what, if any, showing did you make to substantiate your filing?

94 A I made the same talk I have made here about the coal being there.

Q In what way did you make that showing?

A I had witnesses.

Q That was before the office here?

A Yes sir.

Q And, as the result of that showing, they refused to accept your tender?

A Returned—

Q (Interrupting) And turned down your filing?

A Yes sir.

Q Was there anybody else at that time filing on the other—

A I don't remember.

Q (Continuing) —quarters?

A I don't remember whether there was anyone at that time or not, I am not positive.

Q Was there anyone that appeared to contest or make the same sort of contest on behalf of filings on these other quarters and against these homesteaders?

A I don't remember.

Q It was Forsyth who was the homesteader against whom your contest was?

A I think that was part of his.

Q Is it a fact, or not, Mr. Williams, that you have in contemplation, in the event that the Government is successful in setting aside this title, refiling on this land?

A No sir.

A No?

A No sir. I can't refile.

95 Q You feel quite clear about that, suppose it were thrown open?

A No sir.

Q Suppose it were thrown back as—

A (Interrupting) No sir—

Q (Continuing) —decided to be coal land?

A I have never thought anything about the matter.

Q You have never given that any consideration at all?

A No sir.

Q Do you represent anyone who has?

A No sir.

Q I understood you to say that—about some of the swampy land, the wet land in the northeast quarter?

A No, I didn't, I said the general condition of the land, some was rocky and other was swampy and other was good land.

Q From a superficial view of it—I am not speaking from the standpoint of a coal miner who has prospected it, but from a mere superficial view, such as I had, for example, in going over it last week, is there anything to indicate, merely on the surface,—is there anything to indicate that quite a large percentage of the land cannot be cleared, in addition to what is already cleared, and it be used for agricultural purposes and the timber be utilized for whatever purpose such timber could be utilized for—I say simply superficially?

A Well, I don't think I can answer your question except in this way, that any man that has ever been in that country—in that coal belt there, and been around those coal mines
96 and been there, would know that it was coal land.

Q Would you say, Mr. Williams, that aside from the fact that because there was coal land around it that there was a good chance that there would be coal in it—you would not say that from merely looking at the land, without ever going into it, that it was coal land?

A I would, for this reason: I might be—well, here is the situation: I have been going up on that section ever since I was about nine years old.

Q But, anyhow, you have a special knowledge of it?

A Yes, and I have been going into those tunnels and seen the croppings all over it, so naturally when I go there all I can see is coal.

Q That is true. Try to put yourself in the place of a man who had not—

A Well, if a man—

Q (Continuing) —the knowledge that you have, or any knowledge whatever about it, and who goes on that property, as I say, for instance, as I did.

A Well, of course you went up there with the idea of not finding coal.

Q No, don't take me as an example; that might be true.

But I am asking you—I simply used myself as an example, there is no point to that, leave me out of it—but take a man, take any man here, take Judge Green, for instance, and assume that he knows nothing whatever about any previous history of this land, does not happen to stumble on the points where these tunnels are or have been, but just simply goes on the land?

A And sees it.

97 Q Would you say that there was anything about the land which makes it inherently unfit for agricultural purposes, and the timber absolutely useless for anything except mining?

A Yes sir, I would.

Q What is it?

A Why, in the first place, the Sugar Loaf mountain is a big mountain that touches toward all quarters of it, it rises practically in the center of it; and, except where the creek runs, there is not any large amount of good land, the land is rough and rocky, going up the side of the mountain, up the trail to the last cabin that you spoke of; the timber is small and there is timber that is known as mining timber, that is it would be props, lagging and timbers across—

Q (Interrupting) It is known as mining timber, isn't it, because it happens to be in a mining country?

A No, not necessarily.

Q It would not be called mining timber if it was somewhere else?

A Well, at any place in this county or this—

Q (Interrupting) Supposing it were away from a mining country altogether, could not it be utilized for ties or for poles of any kind?

A Oh, it could be used for poles and ties, yes sir.

Q It is called mining timber simply because it happened to be situated in a mining belt, so that it naturally takes its name from that?

A That is the only purpose for which it is used in this county, except for ties and for poles; it is used for ties and poles.

98 Q But the poles made out of it don't have to be used for mining?

A Well—

Q Any use to which poles are put, it could be put to, couldn't it?

A Practically all of it is second growth, except on one part of it there is some good timber.

Q How long ago were you up there?

A I was up there last year.

Q I want to ask you—

A (Interrupting) I was up there this year.

Q I want to ask you some questions that I put to Mr. Starkey. In the southeast quarter of the southeast quarter is the first clearing that you come to?

A That is right by the railroad.

Q That is right—yes, that is close to the railroad?

A Yes.

Q There is a wagon road?

A Yes sir.

Q An old wagon road that crosses right at that corner?

A Yes sir.

Q That is the natural place to start from in going onto it?

A Yes, you go on that way or from the other side of the section.

Q Well, I suppose you can. That is the place that Starkey walked up from Durham?

A Yes sir.

Q Up from the track. There is a cabin and a clearing?

99 A Yes sir.

Q Between that clearing and the next clearing the land is not cleared, there is a strip of timber in there?

A Yes sir.

Q I don't know just how wide it is, because we went around it.

A It is about—

Q (Interrupting) We went around it in going up the hill, to get to this second clearing?

A Yes sir.

Q Now, that land, as far as I could see, that is practically similar in between these two clearings to what it is where either

one of them is; that is, if that were cleared out in between there, there would be a stretch between the two clearings that ran together and it would be substantially the same kind of land?

A There is about 200 feet from that clearing to the foot of the hill, if you go in a direct line.

Q The second clearing, you call the second clearing on the hill?

A No, I mean begin from the old log cabin there where you went in to the foot of the hill?

Q That is the first clearing you are speaking of now?

A No, not counting the first clearing, but from the first clearing it is about 200 feet; if you follow the road down, go on 34, you get on a different section entirely.

Q I didn't see a second clearing in there, it must have been on the southwest—

A (Interrupting) That is where the second cabin is.

Q Yes, the clearing itself is over 200 feet in diameter, 100 and yet there is a distance from which the timber has not yet been taken, there is land between that clearing and the first clearing, so that it must be over 200 feet from the first clearing to the foot of the mountain?

A That would be my idea how far it is until you start to go up the hill, if you go in a direct line. If you follow the old road around to that other clearing, of course it is much further; but walk overland to the land on which the old log cabin is.

Q The third clearing up there—the third clearing, up on the northwest quarter, that is the one right on top of the hill, on top of the hill?

A Yes sir.

Q That one is about as large as the others, it is larger than the second one and about as large as the first one, I should judge, isn't it?

A Well, I don't— Well, it is pretty near as large as the first one.

Q And I went into that, saw there was ground all around there with timber on it, which, if the timber was cleared, would add just that much comparatively level area to it?

A Oh, it is not over a hundred feet from that cabin, maybe one hundred and fifty, until you go right straight down the mountain again, from the last cabin.

Q Well, in some direction it may be true, but there was—

A (Interrupting) It is right on the peak of the mountain, of Sugar Loaf.

Q There is more than 150 feet of cleared land right there?

101 A I mean that you would travel to where the tunnel is, it is about 150 feet until you commence to go right down.

Q Do you know anything about the homesteads that exist up there in that country, do you happen to know men who have taken up homesteads out there?

A No sir.

Q Other than these men here?

A No sir, I don't know of any homesteads there except one further up, about five miles above there, I know one homestead.

Q You don't know that there are not other homesteads up there?

A No sir.

Q But you simply don't know whether there are or not?

A I don't know the names of any except—

Q (Interrupting) I assume you are in the same position that Mr. Boyle admitted he was, and Mr. Starkey, in regard to how valuable this section is for coal purposes, namely, that what you have seen in that 50 foot tunnel is substantially all that you have upon which to base your actual knowledge of what coal there is in it?

A Well, I would base my knowledge of how much coal there is in it—the dip of the veins there, the quality of that coal as compared to other coals here, that I know of, and if it would continue as it is there the amount of coal that should be in the section would—of course I can't tell how it is going to go.

Q It is a fact, isn't it, that there are several working—workable mines up in that country?

A Yes sir.

102 Q It is also a fact, is it not, that there are more prospects and ex-mines up there into which money has been put and which have been abandoned, isn't it?

A There have been several mines abandoned there, that they are now reopening.

Q There are a good many mines up there that have been abandoned, that they are not now reopening, too, are there not?

A Well, four miles above there is one mine, I believe, that is not open; that is the Green River—that is a prospect over on Green River.

Q The Kangley mine is not open?

A No sir.

Q Have you ever been on it?

A Yes sir.

Q What sort of a showing does that make?

A They made a good showing there.

Q And still it is abandoned?

A They are not working it.

Q They are not working it?

A No sir.

Q How long is it since they have worked it?

A It had been some years.

Q So that it is a fact that all through that country, notwithstanding the fact that there are working mines, that there are prospects and mines which, while making a good showing at the outset, have petered out?

A No sir.

Q No?

A A great many of those prospects, they didn't carry them through because they didn't have the money.

103 Q The Northern Pacific had the Kangley mone, didn't it?

A I don't know who owned the Kangley mine. Kangley originally owned the mine himself. I don't know whether he held it—that is, it was generally known as his mine, but I don't know whether he held it for the Northern Pacific or not.

Q You know that the Northern Pacific worked the mine, don't you?

A No, I don't. I know it was worked under Kangley, but I don't know who owned the mine. The coal was purchased, I believe, by the Northern Pacific; that is, they took the out-

put. That is, I don't know as a fact whether it was the Northern Pacific's property or not.

Q How long have you been practicing law?

A Since 1901.

Q And where have you practiced?

A Seattle.

A And how old are you?

A Thirty years of age—thirty years last April.

Q So that when you say that you first went on 34 twenty-two years ago, you were about eight years old at the time?

A Yes sir.

Q And up to four or five years you have been on it off and on?

A Every year.

Q Every year nearly?

A Up until—I used to stay up there, that fish and hunt and stay at this old log cabin right on the railroad track.

104 Q Have you ever made a practice of any other profession or business than the law?

A Well, I have looked after the milk business for Mr. Farrell.

Q Outside of that?

A No sir.

Q You never have made a business of coal mining, have you?

A No sir.

Q You don't pretend to be an expert in coal?

A No sir.

Q Or in valuing the value of coal or coal land?

A No sir.

Q You are simply giving your impressions?

A Yes sir.

REDIRECT EXAMINATION.

Q (Mr. Todd) Did I understand you to say that you contested Forsyth's homestead entry or he contested your coal entry?

A He contested the coal entry.

Q Did you have a hearing before the Land Office?

A No sir.

Q Was any evidence introduced?

A No sir.

Q Why not?

A The matter was dropped, they refused to accept it.

Q They refused to give you any hearing?

105 A Yes, just refused to accept the money and just tendered it back; that is as near as I can remember; that is all that was done.

Q Was there no hearing before the Land Office?

A No, no hearing.

Q No witnesses examined?

A No sir.

RECROSS EXAMINATION.

Q (Mr. Spooner) What did you mean, Mr. Williams, when you said you had witnesses to make the showing?

A I went down there—when I went down to make my filing, took the witnesses over to prove that I had been on the land and over the land; made a tender of the money and they tendered back the money to me, refused to accept it, stating that there had been a contest filed?

Q That there had been what?

A A contest filed, and they handed me it back. That is as far as I went with it. I don't know just exactly who was with me at that time.

Q Well, you did not contest it then?

A No sir.

Q You just dropped out of it?

A I just let the matter drop.

(Witness excused.)

106 JULIUS KLINKER, produced as a witness on behalf of PLAINTIFF, having been first duly sworn, testified as follows:

Q (Mr. Todd) State your full name, Mr. Klinker?

A Julius Klinker.

Q Where do you live?

A Palmer.

Q For whom are you working at the present time?

A I am working for Benny Whitehouse.

Q What is your business?

A My business is butcher, by trade.

Q What?

A Butcher, by trade.

Q You are a butcher by trade?

A Yes sir.

Q What other business have you followed?

A Prospecting and working around mines.

Q State how long you have been a coal prospector?

A Since 1898.

Q For whom did you work at that time?

A For the Northern Pacific.

Q For whom have you worked as a coal prospector since?

A Well, for Gibbons' Occidental mine.

Q Pate Gibbons. Did you ever prospect section 34, township 22 north, range 7 east of the Willamette Meridian?

A I did so.

Q In what year?

A 1898.

Q For whom?

A For the Northern Pacific.

107 Q How much of that section have you been over?

A I have been over the whole section.

Q What did you find in the way of coal on that section at that time?

A I found some good coal there.

Q On what part of the section?

A On the west part of it.

Q On the west half?

A On three quarters.

Q What?

A On three quarters there.

Q On the three quarters?

A Not on the east half, east half runs alongside on that plat there, I didn't find—I didn't get no—

Q (Interrupting) Speak a little slower, the reporter has got to take this down.

A I didn't find any coal at all on this east half of east half—

Q (Interrupting) The east half of the east half?

A The other three quarters I got coal on.

Q That is the east half of the east half—you didn't find any surface indication of coal?

A No sir.

Q Were there any tunnels on the east half of the east half?

A No. Well, there was some I think through part of it—the other.

Q How many veins of coal did you find on that section?

A There was four veins, and I found four more after that.

108 Q There is no hurry here, just take your time and answer slowly so that we can all hear you. We will save a good deal of time that way.

A Well.

Q You are talking too fast and too low.

THE MASTER: Speak up loud and speak slowly.

Q (Mr. Todd) You say you found four veins in addition to the four veins already discivered?

A Yes sir.

Q What is the general character of those veins?

A West—I had a book.

Q Have you got a book here?

A No, I forgot it.

Q Left it home.

A About five feet one vein, and six feet, a streak—six feet of coal and a streak of dirt in the middle of that about four inches; and them others is—well, however, it run about from four to six feet; a little dirt in, mixed.

Q Did you sink any holes yourself?

A I was working. I didn't sink no holes. We drove tunnels.

Q You drove tunnels into this Sugar Loaf mountain?

A Yes.

Q Who was working with you at the time?

A A fellow named Johnney Gurrand and a fellow named George Green, he was the boss for a while and he got his eye knocked out; then he went to Cle Ellum. He is superintendent up there now, the N. P. put him in superintendent up there at the mine.

Q What kind of coal did you find?

109 A Well, pretty good coal.

Q In all the tunnels you drove?

MR. SPOONER: Objected to as leading.

A There was three—four good tunnels drove. The others we just went a little in, about eight or ten feet, you know, in them other tunnels, is all.

Q On which parts of the section did you drive those tunnels?

A The west.

Q What?

A On them three quarters there; that would be the northeast and the southeast and half—no, the northwest of the southwest, and half of the east—took it a mile long. Before it was different, you know, the way we had it. These fellows that took it a mile long, Forsyth—he is on the east part of it and Forsyth on the other and another two quarters.

Q You must talk so that this man can get down what you say.

A All right.

Q Were these veins in your opinion veins that could be commercially worked?

A Yes sir.

MR. SPOONER: That is objected to as incompetent.

MR. TODD: He is a coal prospector.

MR. SPOONER: Every man who has dug in the ground up there is not competent to tell whether that was capable—

THE MASTER: (Interrupting) He may answer, for what it is worth. Objection overruled.

Q (Mr. Todd) What is the character of this section,

110 as to being agricultural land?

A There is not much good land up on the three quarters there. Turner's place is pretty good land.

Q Do you know Zachriah Turner?

A I do, yes sir.

Q How long have you known him?

A I have known him about twelve or fourteen years.

Q What has he been doing during that time?

A He ran a store in Cumberland first when I knew him, and then afterwards in Palmer.

Q Are those both mining towns?

A Yes sir. Well, is no mines, it was close by it.

Q Cumberland, you say.

A Cumberland.

Q How near is Cumberland to this section?

A About four miles and a half.

Q Did you know Thomas B. Forsyth?

A Yes sir.

Q How long have you known him?

A Since he moved up there to that place—

Q (Interrupting) You didn't know him before that time?

A No sir.

Q Do you know what business he followed prior to that time?

A I could not say. He had been always at South Prairie mine, I guess. I never know it.

Q Did you know him after he moved onto this section?

A Yes sir.

Q Did you ever have any talk with him about the character of the land, as to being coal land?

A I never talked to him about it. He drove me off

111 once.

Q He what?

A He drove me off his place once.

Q What were you doing on his place?

A I was going in his tunnel and he would not let me go.

Q What did he say, anything?

A I had to get off or he would blaze away.

Q He had a gun with him. What were you doing, driving a tunnel, you say?

A No, I was going into it.

Q Into the tunnel?

A I wanted to look at it, get some samples.

Q Where were you when he first saw you?

A I was right there close to the tunnel and he was slashing, falling timber right across.

Q That was the tunnel on the west half of the east half of the section?

A Yes, right on the line.

Q Did you know Ordin Olsen?

A I knew him by sight, not very—I ain't acquainted with him; I have seen him several times when he was living there on that place.

Q Did you know him before he went onto that quarter?

A No.

Q Do you know whether he had ever worked around the mines there?

A He always worked at Black Diamond.

Q How long before this, do you know?

A Oh, he worked there a good while, I guess; I could not say how long.

Q Do you know Robert Barbee?

112 A Yes.

Q How long have you known him?

He was working for me when I was prospecting for Gibbons the first time I met him. Him and I was drilling.

Q Where were you prospecting at that time?

A At section 16.

Q Section 16 in this same township?

A Yes sir.

Q What was he doing with you, prospecting?

A He was drilling, drilling, running drill for coal.

Q Was he a miner?

A He was—no, he is a carpenter by trade. He worked with me for three or four months there. I had a prospect and he was drilling.

Q Had he ever worked with you on this section?

A Not an that section, no sir.

Q Had you ever been on that section prior to 1898?

A Lots of times.

Q Had you ever been on for the Oregon Improvement Company?

A I had several fellows—companies out there to show around; I don't know which company it was. Several fellows.

Q How long prior to 1898 had you known of this land as coal land?

A How long before you mean?

Q Yes, how long before 1898?

A No, I didn't know it before.

Q Before 1898?

A That is when I was sent out to prospect.

113 CROSS EXAMINATION.

Q (Mr. Spooner) Whereabouts were you working when the Northern Pacific sent you up there, how close to this?

A I was in Kangley.

Q Right next to it?

A Yes sir.

Q How long had you been in Kangley?

A Well, I worked there three years.

Q Two years?

A Three years before they closed down.

Q And you never had—during those three years you had never known that this was coal land on 34 until the Northern Pacific sent you over there to prospect it?

A No, I didn't know it, I didn't see it; I was running a butcher shop then up in Kangley.

Q Do you know why the Northern Pacific sent you over there to prospect?

A Well, I went for it.

Q What?

A Yes, sure.

Q Why?

A Find coal, to prospect for coal; that is what they sent me there for.

Q You found some coal, did you?

A Well, there was some veins of them and founs four more.

Q What did the Northern Pacific do about it?

A Well, I don't know.

Q They never took it, did they?

A They didn't take it.

114 A They didn't take it.

Q So far as you know?

A Well, I don't know nothing about it.

Q You say you found eight veins?

A No, I didn't find eight veins of coal; four. Besides there was four of them when I got there.

Q You mean to say there were eight veins showing already?
A No sir—yes.
Q How?
A No, I could go right to it.
Q I don't understand you?
A Yes.
Q There were eight veins?
A No, I found there was four of them, found four after.
Q You found two?
A Four.
Q Four?
A Yes.
Q Well now, how many tunnels did you find on the land when you got there?
A Two.
Q Two?
A Two tunnels.
Q One was on the southeast quarter?
A Well, the first one.
Q And the other was in the northwest quarter?
A Well, on the west part along there, yes. I never ran lines, things like that.
Q Those were the two tunnels that these men that you have heard testify here refer to, are they not, the same two
115 tunnels?
A Yes.
Q That these men—that Boyles spoke of?
A Yes. There was one tunnel sunk in about 30 or 40 feet down in there.
Q There was a slope in connection with one of those tunnels?
A Yes sir.
Q That was at the mouth of one of these tunnels?
A Yes sir.
Q Those tunnels only showed one vein apiece, didn't they?
A No sir.
Q Each tunnel only showed one vein, didn't it?
A Oh, yes, it could not show more than one.
Q One showed one vein?

A Each one shows.

Q Each one showed a vein?

A Different veins.

Q And where were the other two veins that you found down there?

A There was four I found.

Q That had already been discovered. Two of them you found by looking in those tunnels, didn't you?

A Yes, they was opened there already.

Q Two you found that had already been opened?

A Yes.

Q In those tunnels?

A Them other two was only just a cropping, anybody could see them.

Q Just cropping?

116 A Well, no they had a little work done on it. I don't call that a tunnel.

Q About how much?

A About two or three feet.

Q Did you dig down any deeper?

A I did.

Q How far?

A Oh, maybe five or six or ten yards, something, there was some cut drove into it, now, shows up there.

Q Where were the other four?

A All of them on the side hill there.

Q On the side hill?

A Yes sir, right up there on that mountain side.

Q And how deep down did you dig on the other four that you discovered?

A We didn't dig down, we drove in.

Q Or drive in, I mean?

A Well, I don't know exactly; I never measured.

Q Well, just give us an estimate.

A Oh, maybe about ten or twelve yards or—

Q (Interrupting) Which?

A About ten or twelve yards, something like that.

Q Ten or twelve yards?

A Yes.

Q And what did you find?

A Found coal.

Q The same—did you find the same amount in each one?

A No sir. No sir, there is different veins, there is a good deal of difference between each vein too.

Q How far up the side of the hill were these?

117 A Well, not very—four, five, six veins. Where they dip down from the other side, where it slopes down from Sugar Loaf, two veins on this side before you get up where that tunnel was drove in with Forsyth's. Then there is a vein, another one we found away down on the corner there.

Q How long were you in there doing that work for the Northern Pacific?

A About four or five months, I guess.

Q Four or five months?

A Something like that. I don't know exactly. We went in to Issaquah from out there.

Q Do you know why the Kangley mine closed down?

A Well, that is hard to say. It went out of coal.

Q What?

A It went out of coal.

Q Out of coal?

A They could not find it again.

Q That is right adjoining, right next to this section, isn't it?

A That is on 26 this is. No, it is 35 between it.

Q What?

A Yes, it adjoins too.

Q It corners it, doesn't it?

A Yes, corners.

Q Do the veins on the Kangley run the same direction that these did that you found?

A Yes sir.

Q On 34?

A Yes, run the same way.

118 REDIRECT EXAMINATION.

Q (Mr. Todd) You stated that you did not know this was coal land until you went on it in 1898?

A No, I didn't know nothing about it before that.

Q Had you prior to that ever heard it spoken of as coal land?

A Yes, coal land.

Q How generally was that spoken of as coal land around there in 1898 or prior thereto?

A Well, the fellow what owned that, what was living there, he told me, he said we had to get permit for him to get in there.

Q I mean how generally around there did you hear it spoken of as coal land?

A Oh, they have all said that, every one of them around there knew it is coal land.

(Witness excused.)

PATRICK WALSH, produced as a witness on behalf of PLAINTIFF, having been firsy duly sworn, testified as follows:

Q (Mr. Todd) State your full name?

A Patrick Walsh.

Q W-a-l-s-h?

A W-a-l-s-h.

119 Q Where do you live?

A Issaquah.

Q What is your business?

A Farming.

Q How long have you been farming up there?

A About elev years, I guess.

Q What did you do prior to that time?

A Worked in coal mines.

Q What coal mines have you worked in?

A Well, I have worked in them most all around here, Renton, Black Diamond, Franklin and Newcastle.

Q Do you know this land which has been testified to here, section 34?

A I do.

Q How long have you known or been acquainted with it?

A Well, I think the first time I went up there was about 1886, maybe.

Q Whom did you go with?

A Alone.

Q What were you doing up there?

A I was prospecting also.

Q For yourself?

A For myself.

Q Did you prospect on this section at that time?

A Not at that time, no.

Q Did you go over this section at that time?

A We had to go over it, the trail went over it.

Q What part of it did you go on, do you remember?

A It would be the southeast I think and north—southwest, it started at the southeast and went to the southwest.

120

Q Were there any tunnels on it at that time?

A Yes sir.

Q How many did you see?

A I just seen a slope that time and a tunnel that ran in by the slope.

Q Did you examine any coal there at that time?

A Yes sir.

Q What kind of coal did you find?

A Well, I considered it was pretty good.

Q Did you notice the vein?

A Yes.

Q Could you state as to its width or size?

A No, it was filled with water when I was there. I could not.

Q Did you ever work on that section after that time?

A Yes sir.

Q What year?

A About 1898—'90 and '91 I should think, some in that way.

Q What was the general reputation around in that vicinity as to the character of that land?

A Well, most of them considered it was coal land.

Q How generally was that known around that vicinity in 1890?

A Oh, pretty near everybody that came in there could see the coal on that trail; that was about the only way to get in.

Q Did you ever work there after 1891?

A No.

121 Q And you went over to Issaquah about that time?

A No, I came here to Seattle. I stayed here in Seattle.

Q I mean have you ever lived up in that vicinity since that time?

A I have never been up there since.

Q You knew Zachariah Turner up there at that time?

A No. He was clerking in Franklin store, I think; I was not very much acquainted with him.

Q You knew—

A (Interrupting) I knew of him.

Q How long had he been living up there?

A Who?

Q Zach Turner?

A I could not tell you that. I just passed through Franklin.

Q Did you know Thomas Spaight?

A Yes.

Q Where was he living?

A He was working at Black Diamond, I think, when I was there.

Q For whom?

A Black Diamond Coal Company, I think, or butchering.

Q Did you know how long he lived up there?

A I only lived there about two years myself.

Q Was he there during all that time?

A He was there during that time.

Q Did you ever see him after that?

A Not very often. I ain't very well acquainted with him.

Q What?

A I ain't very well acquainted with him.

122 Q Did you know him after you left there?

(No response.)

Q Do you know how many veins of coal were opened up on that section?

A Well, the tunnel was one, and then there was two between that and this way, north, that northern point, that connecting on 28 and 34 and 35, I think, something in there; I know of two on the trail besides that.

Q How many veins does that make altogether?

A That would be four all right.

Q What was the character of that coal as to being merchantable coal or not?

A Well, the two—the slope and the other one looked all right, but the ones up above they hadn't been developed, you know, any more than just right on the grass roots.

(No cross examination. Witness excused.)

JOHN J. FRASER, produced as a witness on behalf of PLAINTIFF, having been first duly sworn, testified as follows:

Q (Mr. Todd) John J. Fraser is the name?

A Yes sir.

Q Where do you live?

A Ravensdale.

Q You are working in the mine there?

123 A No sir, not at present.

Q What has been your occupation?

A Miner.

Q For how many years here?

A Twenty-five years.

Q Have you worked at any of the mines in the vicinity of section 34 spoken of here?

A Yes sir.

Q What mines?

A I have worked in Kangley, I have worked in Durham and what we call the Alta Coal Company mine between Durham and Kangley, belonged to the Alta Coal Company.

Q Have you ever worked in any of the Pacific Coast Company's mines?

A Yes sir, worked in Franklin, Lawson and Black Diamond. Black Diamond was the second mine I ever worked in on the coast.

Q Have you ever been on this section 34?

A Yes sir.

Q When were you on it first?

A Twenty-three years ago, as far as I can recollect. I might have been there a little before that, but that is as near as I can recollect.

Q (Mr. Spooner) How long ago did you say?

A Twenty-three years.

Q (Mr. Todd) Had any tunnels been sunk on it at that time?

A Yes sir, they were working on it when I was there, a party was—some parties was working in it.

Q Do you remember on which part of the section they
124 were working?

A They were working on the slope the first time I went there, sinking a slope at the foot of the hill, almost at the foot of the hill on the southeast quarter. Of course the land was not surveyed then, but it was just—they were figuring on the southeast quarter of the section.

Q How many men were there working there at that time?

A There was four or five of them there. I really forget their names, all. There was Jim Maguire, Fred Hanson and there was—

Q (Interrupting) It does not make any difference.

A I forget his name now, exactly.

Q Did they take out any coal at that time?

A They were putting out some on the dump, there was coal and dirt mixed in the slope.

Q Did you examine that coal?

A Well, I was looking it over a little.

Q Did you ever use any of it?

A Yes, we have used considerable of it after that during the time we were at Durham.

Q What was its character, or what quality of coal was it?

A Well, of course it was a lignite coal, there is no question about that, but it was a good burning coal and we used it to burn in the stove there in Maguire's saloon, we burned tons of it in there, packed it home in sacks and burned it during the winter. It acted good for domestic purposes, as far as I could see. Left considerable of ash and debris. You could not expect anything else from croppings.

125 Q What work did you ever do on the section?

A Well, in 1893 we were working on the Alta Coal Company and closed down for about three months, and Maguire was holding this section—a portion of it—and he sent me out to the northwest quarter of 34 to work some assessment he wanted

to do or something, he called it assessment anyhow, and to drive the tunnel and get some more coal out and fix up a little out on the northwest quarter. That is about all the work ever I did on it, to amount to anything.

Q Did you build a cabin there at that time?

A The cabin was built when I went out, there was a cabin built.

Q Have you ever opened or assisted in opening any veins of coal on that land?

A Not more than just what little work I done on them that was open. I worked a little in a couple of them, but not very much.

Q How many veins were opened on that section, to your knowledge?

A There is a slope, a tunnel drove on the southeast quarter of it.

Q Now, that tunnel on the southeast quarter was on the west half of that southeast quarter, was it?

A Well now, I could not tell you that just exactly, because I don't know what distance it is now from the corner, because the land was not surveyed when we were in there and I could not just exactly state to whether it is on that or not.

Q Where were the other tunnels?

126 A And then way up on the hill, as far as I can learn, or as far as I can see into it at the time I looked it over, it is on the southwest quarter of 34; and the other tunnel—there is another tunnel that was supposed to be, whether it is or not, I am not going to testify exactly to that now—it was supposed to be on the north—

MR. SPOONER: (Interrupting) You will not testify anything that you don't know.

A Well, there was a tunnel drove there with the intention of being; if it ain't on, it is just on the edge of the line—

Q (Interrupting) Which quarter?

A On the northwest quarter of 34.

Q Now, when were those tunnels put there, what years, do you remember?

A Well, they were partly driven when I went there in 1885,

the first time I went through to Durham on that—there was no Durham there, but I went through the trail, they had a trail built there, a pony trail, through into that country, from Black Diamond.

Q How generally was that land around there spoken of as coal land—this section, do you know?

A Well, in the last—after Durham started up it was spoken of generally by many parties and many parties went to see it, as far as that is concerned, but what they did about it I don't know; the land was not surveyed and I don't know how matters were standing, on account of the land not being surveyed at that time.

Q What year was Durham opened up?

127 A Durham was opened up—let me see, I believe it was in 1888.

Q What section is Durham on, do you remember?

A Section 2.

Q And this town or the town south of here?

A It is in township 21.

Q That is the township south of here?

A Yes sir.

Q You know these homesteaders on there, did you, Turner and—

A (Interrupting) Turner.

Q You knew Turner?

A Yes sir.

Q How long did he live up in that locality?

A Well, he has been living between Franklin and Palmer—what we call Palmer, for the last eighteen or nineteen years, to my knowledge.

Q How long have you known Barbee up there?

A The first time I knew Barbee, I believe it was in 1900, when he first came to Ravensdale.

Q What did he do at Ravensdale?

A I think he was framing timbers for the mine and building chutes and one thing another, or doing a little—fixing cars etc., anything that came his way in the way of carpenter work.

Q When did you first know Olsen?

A 1893 was the first time I got acquainted with Olsen.

Q Where was he working at that time?

A He was working in Kangley.

Q In the mine?

128 A Yes sir.

Q How long did he live around that part of the country?

A He was not a great while there, he lived there for about somewhere in the neighborhood of a year, to my knowledge; that is about all. He might have been there before I came there, but that is about all I was acquainted with him.

Q Where did he live between the time he lived at Kangley and the time he made this homestead entry?

A Well, I guess he has been in different places. He was awhile working at Lawson's, where the new mine was opened up at Lawson's, above the Diamond. We moved from there over to Lawson's.

Q Was he working as a miner at all those times?

A Well, I don't know exactly. He told me he was out fishing awhile, somewhere on the Columbia River somewhere; he went off on a trip. I don't know what he was doing, but all I knew of him was as a miner.

Q Did you know Forsyth?

A Yes sir.

Q Where had he been working prior to the time he made the homestead entry?

A Most of the time during the time he made his homestead entry he was in Barnett, what we call South Prairie, the Barnett coal mine.

Q Did you ever have any conversation with any of these homesteaders with regard to being a witness for them on their homestead entries?

A No, Mr. Barbee asked me once in Ravensdale if I would and I stated to him this way, that I could not see my way clear to do it.

129 Q Did you state why you could not see your way clear?

A Well, I did state to him that the coal was visible and

that there was considerable of tons of coal out on the dump there, all piled in sight, that it didn't look very good for a man to go and testify as a homesteader. I told him he had better get somebody else. That was all that I stated.

Q You didn't have any talk with the other homesteaders about it?

A No, I never stated nothing to them concerning it.

CROSS EXAMINATION.

Q (Mr. Spooner) Whereabouts is the Alta mine with reference to this property, how far from it?

A It is about three quarters of a mile.

Q When was that mine opened up, do you remember—as near as you can remember?

A I believe it was in 1890 or 1891 when they first started in on it, something like that, 1890 or '91.

Q When were you working on it?

A I worked in 1893.

Q What sort of a showing did they have at that time?

A They had a good showing.

Q Is it being operated now?

A No sir.

Q How long ago did they cease operations on it?

A Fifteen or sixteen years now, somewhere like that anyway; I would not be sure to a year, but somewhere in

130 that neighborhood.

Q Do you know the reason for stopping?

A Well, I partly know the reason why it is not operating today.

Q Why was that?

A Mismanagement.

Q But in fifteen years you say it has not been operated?

A Somewhere like that, I would not be sure that it is quite fifteen, it may be a little over, but I ain't sure. That is as near as I can get to it now.

Q When did you work in the Kangley mine?

A I worked in the Kangley mine in 1892.

Q That had a good showing—

A (Interrupting) And a portion, probably, of 1893, I would not be sure.

Q That made a very good showing at that time, didn't it?

A There was portions of Kangley that made a good showing, although they were a little broken—formation was a little broken, faults once in a while.

Q How far had they gone into the Kangley at the time you were working on it, just approximately.

A They were 1700 feet down on the slope.

Q And that has not been operated, has it?

A Oh, yes, all that coal has all been taken out.

Q What is that?

A It has all been taken out. The cause of the Kangley closing down as far as I can see—

Q (Interrupting) Well, do you know the cause?

A It was operating when I left there, and the reason that I think it closed down at that time—

131 Q (Interrupting) I want to know whether you know the reason. If you just simply guess, you need not state.

A I could not go and state, because the coal was all right when I was working in it and everything was all right at that time, and they worked for about a year, I guess, or thereabouts, they worked some time, anyhow, after I quit and went to the Alta Coal Company, and that closed down during the time I was there.

(Witness excused.)

S. D. FRASER, produced as a witness on behalf of PLAINTIFF, having been first duly sworn, testified as follows:

Q (Mr. Todd) Mr. Fraser, where do you live now?

A Ravensdale.

Q S. D. Fraser is your name, isn't it?

A Yes sir.

Q What is your occupation?

A Practical miner.

Q How long have you worked as a miner in this county?

A In this county? I have been here since 1884. I have been out of it about three years in that time.

Q Have you ever been upon section 34, spoken of here?

A Yes sir.

Q When were you on it first?

132 A I was on it first in 1885.

Q How often have you been on it since that time?

A It would be a hard matter for me to answer how often I have been.

Q I mean approximately?

A I have been various times there.

Q Have you ever worked on the section?

A I have worked a little, not to any great extent.

Q Have you ever noticed how many tunnels there are or were on the section—coal tunnels?

A I could not positively state how many might be on there.

Q How many have you seen?

A I have noticed two tunnels—well, in fact three. I could not call it anything else but a tunnel. This practically has caved down, part of it, but I know it was driven as a tunnel.

Q On what parts of the section are these different tunnels?

A There was a tunnel and slope on the southeast quarter; there was a tunnel driven up on the southwest and one on the northwest.

Q Did you ever examine the coal showing in those tunnels?

A Yes sir.

Q What kind of coal was it as far as you could judge?

A It looked like to be fair coal, marketable coal.

Q Did you notice how many veins of coal had been opened up on the section or have been on the section?

A All I could testify is what I seen. I have seen three different veins.

Q How long did you live in that vicinity?

A I have been in that vicinity for—on and off for

133 about ten or twelve years.

Q Do you know any of these homesteaders—Zachariah Turner?

A Yes sir.

Q How long did he live in that vicinity?

A He has been along from Franklin and Palmer and Cumberland for the last sixteen or seventeen years.

Q Did you know Forsyth?

A Slightly acquainted with him.

Q Do you know how long he had lived in that vicinity?

A I could not say that, because I have not got—hadn't been acquainted with him more than about seven or eight years.

Q Do you know Olsen?

A Yes sir.

Q How long has he lived in that vicinity?

A Olsen, he has been in that vicinity quite a number of years, he has worked in Kangley at the time it was in operation, he has worked in Lawson and at the Black Diamond, he has been in the country a good many years—Olsen has.

Q And how about Barbee, how long has he been—?

A Barbee?

Q (Continuing) —been around that vicinity?

A (Continuing) —is a man that I don't think has been very long in the vicinity, not to my knowledge he has not.

Q What was the general reputation in that vicinity as to the coal character of this land?

A Well, sentiment was—

134 MR. SPOONER: (Interrupting) I would like to object to that form of question. I think it would be proper to ask him if he knows.

MR. TODD: Well, I should have qualified him.

Q (Mr. Todd) Do you know what was the general reputation in that vicinity as to the coal character of this section 34?

A Well, the—

Q (Interrupting) Do you know?

A Yes.

Q I mean do you know?

A Yes sir.

Q What was it?

A The sentiment was that it was coal land.

(No cross examination. Witness excused.)

EARL EVANS, produced as a witness on behalf of PLAINTIFF, having been first duly sworn, testified as follows:

Q (Mr. Todd) State your full name?

A Earl Evans.

Q Where do you live?

A Renton.

Q What is your business?

A I don't have any business.

Q What used to be your business?

135 A I used to run a saloon there. I am retired from business now, though. I don't do anything.

Q How long have you lived in Renton?

A Been there about thirty years.

Q How long have you been acquainted with section 34, mentioned here in the evidence?

A I think I have been acquainted with that section for since about 1882.

Q Were you ever on it?

A Yes sir.

Q When were you on it first?

A About 1882.

Q And had any work been done on that in prospecting it for coal at that time?

A Not at that time, no sir.

Q What was the purpose of your going on it?

A Just—the first time I went there was just—there was five of us just prospecting through the country to see what there was in there.

Q Had you much experience prospecting for coal?

A Not very. I have worked in coal mines, but never had much experience prospecting.

Q Did you find any indications of coal on that section at that time?

A I found some, yes.

Q How often were you on that section after that?

A Oh, I crossed through at various times, been up fishing and one thing another up on Green River, after the trails was cut in there.

Q Did you ever notice any tunnels on that section?

A I never saw a tunnel. I saw one slope, a little slope.

136 Q When was that, what year?

A It must have been in 1885, somewhere along there.

Q Was anybody working there at that time?

A I thing there was a few men, some three or four.

Q Are you generally acquainted around through that part of the country?

A Yes sir.

Q For how many years have you been?

A I have been acquainted there since—well, twenty-six or seven years, I guess—since about 1882.

Q Do you know the general reputation of that section in vicinity during the years prior to 1901, as to the coal character of the land?

A Yes sir.

Q What was it?

A Well, the general average I think is not very good.

Q No, but you know the general—do you know what was generally said in that country relative to this section being or not being coal land?

A To that certain section?

Q Yes, 34?

A Well, I have often heard it called coal land.

CROSS EXAMINATION.

Q (Mr. Spooner) You state you heard it said that it was coal land. Can you state whether or not—I suppose everything in a general sort of way up there in that vicinity is spoken of as coal land, in a certain field around there?

137 A Well, more or less it was, yes.

Q Was this spoken of as peculiarly good coal land, or simply as coal land in that broad sense?

A No, it was spoken of as coal land, not particularly good, as I know of, any more than the balance of it.

(Witness excused.)

The hearing was here adjourned until 10 o'clock tomorrow morning.

Proceedings of October 15, 1909.

F. H. WHITWORTH, produced as a witness on behalf of PLAINTIFF, having been first duly sworn, testified as follows:

Q (Mr. Todd) Please state your full name?

A F. H. Whitworth.

Q What is your profession?

A Civil engineer.

Q What experience have you had in mining engineering?

A I have had considerable.

Q For what period of years?

A Well, my first experience commenced in 1868 and I have had more or less experience since then.

Q Has that experience had to do with coal mines?

138 A Yes sir, that is what I speak of—coal mines.

Q In this county?

A In this and Pierce County, in western Washington.

Q How long have you lived in this state?

A Since 1854.

Q Have you had experience in exploiting and developing mines?

A Yes sir.

Q What different mines?

A I opened the Gilman mine, and now called Issaquah; I opened what is called the Leary mine, now the Ravensdale; I was superintendent of the Renton mine for a time; I assisted in locating and the original opening of the Wilkeson mine, also the South Prairie mine, in Pierce County; also the Wilson coal mine in Lewis County, I think it is, near Chehalis or Centralia; and then I have examined quite a number of other coal propositions.

Q Have you had experience in prospecting for veins of coal?

A Yes sir.

Q Please state whether you are acquainted with section 34, township 22 north, range 7 east of the Willamette Meridian, in King County?

A I am.

Q When did you first have reason to become acquainted with that section?

A I discovered the coal on that in April, 1882.

Q With whom were you at that time?

A Mr. E. M. Smithers, Mr. Al. Evans and there was three other men I think, and an Indian.

139 Q At what part of the section did you make discovery?

A At that time the sections—township was unsurveyed, but the point that we discovered and opened up the cropping, when the survey was made it was at the south quarter corner on section 34. The south quarter corner was set on the bank just above the opening.

Q How did you come to make discovery, were you prospecting for coal?

A Yes sir.

Q Did you take any steps to trace that vein?

A Yes sir.

Q What did you drive?

A We drove it to the east and—well, of course we spent some considerable money in opening at this discovery point, tracing it both east and west a short distance, and then we traced it to the east along the slope of the hill and finally drove a slope and also a drift on the strike at some 800 feet east of the quarter corner and about 400 feet north of the south line of the section.

Q In what year was that done?

A It commenced in 1882 and continued for several years; I can't—I should say that the most of the work was done between 1882 and 1887, perhaps shorter that that.

Q Was that work done for the purpose of exploiting the land and acquiring coal claims?

A Yes sir.

Q Who was interested in that exploitation?

MR. SPOONER: Objected to as irrelevant and immaterial.

THE MASTER: Objection overruled. It is a part of the res gestæ, I suppose.

140 MR. TODD: Yes, that is all.

A A syndicate was formed of four parties. Well, until the township was surveyed, there were I think simply four or five interested in the matter; that was E. M. Smithers, J. M. Colman, James Williams and myself, I guess.

Q When did Mr. Howard become interested in the matter?

A It was—the year I can't just state, but the Oregon Im-

provement Company jumped the property and then he became interested in it.

Q What position did Mr. Howard hold with the Oregon Improvement Company, if you remember?

A I presume he was president. I can't just state now. He was the executive officer.

Q Now, Mr. Whitworth, go ahead and describe what other work was done on this section in the way of discovery and exploitation of coal veins?

A We were examining frequently for the purpose of seeing other veins if possible on the land. There was finally opened, near the quarter corner, on the west line of the section, a vein, and a tunnel was driven in on that—oh, I think about 150 feet, disclosing a vein there. Then on 33, the section immediately to the west of 34, a vein cropped. It was near the northeast corner of 33 and the northwest corner of 34. The strike of this vein was about sixty-five I think—south sixty-five east, running towards section 34. We drove in two tunnels on that vein, but did not reach quite to the line of 34, so that vein never was shown up on 34, although it came—the nearest point 141 that I recollect was was about 60 feet from the line of section 34, but not on section 34, not exactly. That I think gives the work that was done. This was continued during a number of years, cleaning out the tunnel, driving a little further, opening up a little more so as to show more fully.

Q How much money did you and the association that was interested in this section spend in these exploitations?

MR. SPOONER: Objected to as irrelevant and immaterial.

THE MASTER: Objection sustained.

MR. TODD: Well, the reason of that is to show how much work was done on it and to show that it must necessarily have come to the knowledge of these homesteaders. I want to show how much work this association did on this during the ten or fifteen years that they were in possession there, showing it must have necessarily have come to the knowledge of these homestead entrymen that work was done on there in exploitation.

MR. SPOONER: I will withdraw the objection. You may state how much money was spent.

Q (Mr. Todd) Go ahead, Mr. Whitworth.

MR. SPOONER: (Continuing) If you know?

A Something over $8,000.

Q (Mr. Todd) Describe the topography of this section?

A This section is also called Sugar Loaf mountain. This is a mountain that rises to a peak, the center of the peak a little to the south of the center of the section, and it slopes down on all sides, the mountain being an irregular pyramid; the east line of the section being the lowest line. On the south it runs into 3, and the ridge continues on to the south and so does not

142 reach the low leved on on the east.

Q What is the character of the soil on the section?

A Disintergrated sandstone.

Q Is it in your opinion suitable for agricultural purposes?

A Well, it is not bad land. It would be fair upland for orchard purposes, something of that kind.

Q Please state—

A (Interrupting) Oh, let me state: The east half of the east half is somewhat low and is covered with maple and there is a stream meanders through it; that east half of the east half is fair bottom land, rather, for cultivation after it is cleared.

Q You understand the different parts that were homesteaded, the east half of the east half?

A Yes sir.

Q The west half of the east half and the two west quarters?

A Yes sir.

Q Please state whether you found coal on all of those different subdivisions?

MR. SPOONER: I object to the leading nature of the question.

Q (Mr. Todd) Please state whether you found coal, or not, upon those different subdivisions?

MR. TODD: I don't know whether he did or not.

A We never opened any coal on the east half of the east half.

Q Did you on the other subdivisions?

A No sir; on the northwest quarter of the northwest quarter we never got the coal quite—

143 Q (Interrupting) The northwest quarter was located?

A The northwest quarter, we never got the coal, quite, on the northwest quarter. As I say, a vein cropped in 33 and we traced it and had driven to within 60 feet of the line, but never had driven across.

Q From your examination, did you determine whether there was coal on the east half of the east half?

A We were very sure there was.

Q From your examination, did you determine whether there were veins of coal upon the northwest quarter?

A Yes sir.

Q Now, how many veins of coal did you discover upon the whole section?

A There was only the three—well now, on the section itself, you mean?

Q Yes, upon the whole section.

A Only the two that showed up on the section itself.

Q How many years were you acqainted with the section?

A From 1882—I think it was 1902 when we were driven off of it.

Q Now, what kind of coal was this that you discovered there?

A The discovery vein was a bituminous coal; the vein showing on section 33, running towards 34, was not so strong a bituminous coal, but it was a semi bituminous.

Q Did you ascertain whether the veins contained a merchantable amount of coal and whether it was of a merchantable quality?

A Yes sir.

Q Was it your opinion and is it now, that the land

144 was valuable for the coal upon it?

A Yes sir.

Q Mr. Whitworth, state whether the west half of the east half was and is still in your opinion more valuable for the coal upon it than for agricultural purposes?

MR. SPOONER: That is objected to as leading. Certainly it is leading.

THE MASTER: Objection overruled.

A Yes sir.

Q (Mr. Todd) State whether the southwest quarter in your opinion is more valuable for agricultural purposes or more valuable for the coal upon it?

A For the coal.

Q State as to the northwest quarter?

A For the coal.

Q State as to the east half of the east half?

A For the coal.

Q Did you ever take steps to acquire title to this section—you and your associates—from the United States Government?

A We filed as a syndicate of four on the section.

Q How long did you keep your possessory rights?

A An association was formed at several different times. I was at every time the officer in charge. And so it was for a number of years, that associations were formed and held this coal.

Q Who paid the expense of the filings and work down upon it?

A The principal work, as I say, was done before the section and township was surveyed, and that was paid by

145 this first syndicate that I spoke of, Mr. Smithers, Mr. Colman, Mr. Williams and myself.

Q After Mr. Howard was interested in it, what part of the expenses did he pay?

A He paid—

MR. SPOONER: (Interrupting) That is objected to as irrelevant and immaterial, what part Mr. Howard paid.

MR. TODD: I am going to bring notice of that home to the defendant; that is the purpose of the question.

THE MASTER: Objection overruled.

Q (Mr. Todd) Go ahead.

A One third.

Q During how many years was that paid by him?

A I have not refreshed my memory by looking it up, but I would think something like about eight years.

Q When did you first learn that homestead entries had been made upon this section, that is with reference to the time after they were made, how soon after they were made did you learn of it, you know?

A Within a few months.

Q What steps did you then take to protect your rights there?

A We then attempted to go on with a force, so as to open up afresh the tunnels that had already been constructed, and also to carry the prospect over onto the east half of the east half and to produce the tunnel in 33 so as to reach 34 and show the coal on 34 itself.

Q Did you go up there yourself personally at that time?

A At first Mr. Sidney Williams went up.

Q When did you go up yourself personally?

146 A I went up in about a month I think—or a week, after Mr. Williams had been there, I think it was in—from my guess now it was in May.

Q Of what year?

A Of 1902. I wont be positive about the year, because I have not refreshed my memory, but it was very shortly after the filing of the homestead entries, and it was early in the year.

Q What part of the section did you go upon at that time?

A When I first went, why, we went on the east half of the east half and on the northwest quarter.

Q Whom did you meet when you went on there, if anybody?

A At that time—well, right at that time we only—I only met Mr. Turner.

Q What was done at that time?

A There was nothing done at that time but to plan then how we should go to work in order to show the coal on the other portions of the tract.

Q Did you have any conversation with Mr. Turner?

A Not at that time.

Q When did you?

A Well, about a week afterwards I went up with three or four men, I think it was, and set them to work on different points, to endeavor to open up the croppings in these portions

that the coal had not been shown. I left them there for several days and then went back again and at that time I took them onto the east line of the east half of the east half, where, by projecting the strike of the vein—thediscovery vein, it would indicate a possibility of its coming through, and set them

147 to work. While we were at work, Mr. Turner and Mr. Forsyth came down and ordered us to stop, said that if we crossed the line that the first man that crossed it would be shot.

Q Where they armed?

A Yes sir.

Q You were working on the east line of the section then at that time?

A Yes sir, close to the east line of the section.

Q Was there any talk there about coal between you?

A Yes sir.

Q What was the conversation, as near as you can remember it?

A Well, I told them that of course I was satisfied the coal went through there and I wanted to find it, and that we were interested in coal and wanted to show it up on that portion of the section. I said to Mr. Forsyth, "Of course if we are allowed to go over on the west half of the east half it will be a very small matter to trace the coal down and show it on the east half of the east half," but he said he would not allow us to go.

Q Was that tunnel still open on the west half of the east half at that time?

A Well, that I can't say, I understand that—

MR. SPOONER (Interrupting) Just a minute—

Q (Mr. Todd, interrupting) I mean at that time or shortly prior thereto?

A Shortly prior thereto it was, yes sir.

Q What was the size of that tunnel then?

148 A The tunnel was about eight feet in height and six feet in width.

Q Was it concealed?

A No sir.

Q Had you known Mr. Turner and Mr. Forsyth previously?

A I had known Turner slightly, and Forsyth I think I had met him, he had been a miner at South Prairie.

Q At South Prairie. Where had Turner been working prior to that time?

A Turner had been about Palmer for some time. I don't know what—I think he had worked in the mine, but I don't know just what mine.

Q After your experience with Mr. Turner and Mr. Forsyth, what did you then do with your gang of men?

A Then I took them onto the Northwest quarter of the northwest quarter and endeavored there to—set them to work for the purpose of tracing the vein on 33 across onto 34. They worked there for a day or two and then were notified to quit. I was not there, however, when they were notified.

Q You were not there when they were notified to quit?

A No sir.

Q Did you while you were working there see Mr. Olsen at any time?

A No sir.

Q What steps did you take after that, if any, to acquire these lands as coal lands?

A We came to town and went to see the prosecuting attorney, to see if we could not get authority to go onto the

149

land and show up its character. The Land Office notifying us that we must show, from recent examination, the character of the land. The prosecuting attorney said he could do nothing for us. So then we made application to the Land Office to have the government take it in hand and give us an opportunity of showing the character of the land, but they refused.

Q Do you know whether this section, since you made the discovery upon it, has been known in that vicinity as coal land?

A Yes sir.

Q How generally has it been—has it been so known?

A Yes sir.

Q How generally has it been known as coal land?

A Why, I think by every one that has any knowledge of coal, of King or Pierce County.

Q What is its reputation as to being good or bad coal land?

A The reputation is good.

CROSS EXAMINATION.

Q (Mr. Spooner) You say you discovered coal on 34 in 1882?

A Yes sir.

Q Mr. Evans who was in here, testified here yesterday he lived at Renton, was one of the men that was with you?

A Yes sir, I presume so. I was not here yesterday.

Q Well it would—

150 A (Interrupting) Harold Evans.

Q Yes, that is the man.

A Yes sir.

Q You testified that beginning with 1882 and running possibly from 1882 to 1887, and possibly less time than that, that you expended, or your syndicate expended about $8,000?

A Yes sir.

Q What percentage of that was expended on 33?

A None of it.

Q None of it?

A No sir.

Q The $8,000 you say was expended on 34?

A Yes sir.

Q What are the items—I don't mean the small items—but what in your mind and memory make up the items that constitute that?

A The items was the hire of the men, and the food, packing in the grub and material etc.

Q Do you include the filing fees year after year on that property?

A No sir; they did not amount to anything.

Q How deep was this, how long was this tunnel?

A The tunnel was about 60 feet in depth.

Q About 60 feet?

A Yes sir.

Q Did you state that the Oregon Improvement Company jumped this land?

A Yes sir.

Q Why did you make that statement---when was that?

151 A What year?

Q Yes.

A I judge that was about 1884.

Q About 1884?

A Yes sir.

Q And what was the authority for the statement that they jumped the land, that is, on you?

A We had possession of it and they came in by force and removed us and—

Q (Interrupting) In—

A (Interrupting) How is that?

Q In 1884?

A Yes sir. I say I think it was 1884. I wont be positive to the year.

Q Who came in and what were the circumstances?

A Our men had possession of the section and in some way the trumped up a charge and the sheriff was sent up and our men were arrested and brought down town and their men put in charge. We made a counter charge, the sheriff was sent up and arrested their men and our men were put in charge.

Q Well, how long did this joint occupation continue?

A This seesaw?

Q Yes.

A Why—

Q (Interrupting) Your men were put in charge at the end of your testimony now; did they stay in charge?

A I think that it finally developed that both parties then called rather a truce and were both on the ground, and then it was — a suit was brought and it was fought in

152 the courts and finally a compromise was made.

Q And the Oregon Improvement Company, a corporation, known as the Oregon Improvement Company, was a party to the suit?

A Yes sir.

Q And it was the defendant, was it?

A It was defendant, yes sir.

Q That put your people out of possession?

A I wont say that they were named as a party to the suit, but they were the parties.

Q How do you know that?

A Because Mr. Howard, as their representative, entered into the negotiations.

Q Did he say he was acting as their representative?

A Yes sir.

Q And why do you make the same statement in regard to its being the Oregon Improvement Company's men who jumped it as you call it?

A Well, because we knew.

Q Well, how?

A They were employed by the Oregon Improvement Company.

Q How do you know they were?

(No response.)

Q Isn't it a fact that you thought at that time, and your correspondence would show it, that you thought then that you were dealing with Mr. Howard personally?

A No sir. This was the fact: We said—we allowed Mr. Howard personally to come in and be represented, but it was—he was acting for the Oregon Improvement Company, and the bills were always paid by the Oregon Improvement

153 Company. I say always—not at first, but afterwards they came to be all paid by the Oregon Improvement Company.

Q What do you mean by afterwards? How long afterwards?

A I think it was perhaps a year or two that Mr. Howard attended to them himself.

Q Isn't it a fact at the time you speak of you were dealing personally with Mr. Howard?

A For a year or two we insisted—for a year or two we insisted that it should be personally with Mr. Howard.

Q For a year or two?

A Yes sir.

Q Wasn't it for quite a number of years?

A Well, I wont say the length of time, because it has been sometime since, but it was at first with Mr. Howard personally.

Q Well, by at first—up to what date would you say?

A Well, as I say, I think perhaps it was a couple of years.

Q Well, up to what date about?

A If it was in 1884 that it came, it would have been about in 1886.

Q In 1886?

A Yes sir.

Q And when was this jumping you, '84?

A 1884, is my recollection.

Q Then at that time the time had not elapsed within which you still were dealing with Mr. Howard personally, you were still dealing with Mr. Howard personally at that time, because you say you insisted on dealing with him personally up to 1886?

154 A Yes sir.

Q Well then, why did you state the Oregon Improvement Company jumped the land, if they hadn't, if you hadn't recognized them yet at all?

A We hadn't recognized them, but we knew they jumped it.

Q How do you know it, if you were still dealing with Mr. Howard personally?

A We were not dealing with Mr. Howard then. We dealt with him when he compromised.

Q You said you dealt with him up to 1886?

A From 1884 to 1886, yes sir.

Q From 1884 to 1886?

A Yes sir.

Q Then Mr. Howard had nothing to do with it when you first went in there?

A No sir.

Q Nothing until 1884?

A Nothing until they jumped the claim, and then there was a compromise.

Q Now, as a matter of fact, the land was unsurveyed and was not surveyed until years afterwards, was it?

A I have forgotten when it was surveyed.

Q It was not surveyed until '95 or '96, was it?

A I don't remember when it was. It was after, sometime after 1884 that it was surveyed, but just when I don't recall.

Q Isn't it a matter of fact that you didn't know of the Oregon Improvement Company in connection with this property at all until as late as 1896 or -7?

A It is not true.

155 Q It is not true?

A No sir.

Q Now, in speaking of the amount of coal on the land, you say you discovered two veins and you opened it up in just exactly how many places and to what extent?

A At the discovery point there was a small tunnel driven in, the principal work was surface work.

Q Of what did that consist, how extensive was the surface work and how extensive was the small tunnel?

A The small tunnel was only in probably 20 feet.

Q 20 feet?

A Yes sir.

Q And what about dimensions?

A I suppose something like six feet high and six feet wide.

Q What was the nature and extent of the surface work that you speak of there?

A The surface work was simply on the surface, showing up—it was a very wide vein and it did not cover a space over 50 or 60 feet square.

Q And what did it consist of, how deep did it go?

A Just the surface, only a few feet.

Q Only a few feet?

A Yes sir.

Q Now, what other uncovering of the vein or veins did you do on section 34?

A Well, the vein was traced along the side of the hill to the east.

Q Well, what does that mean, how far apart were the openings that you made, in tracing it, or what did the

156 tracing consist of?

A Tracing consisted in following the cropping, digging in at frequent intervals, finding either the roof or the floor, or the vein itself, and so tracing it on around the hill to a lower point, where the tunnel and slope was put in.

Q And how extensive work was done, how long did it take, that tracing, merely tracing on the surface of the vein?

A That tracing probably did not take more than two or three days.

Q And what other work was done?

A Then the slope was driven on this west half of the east half and the tunnel driven.

Q That constitutes the work?

A At that point, yes sir.

Q About how long would it take or did it take to drive the small tunnel and do that little surface work that you steak of, about 50 feet?

A If it were driven at one time the tunnel—oh, could be driven—the open cut and the tunnel made I suppose in six weeks.

Q In six weeks?

A Yes sir.

Q A 20 foot tunnel?

A No sir, that was—which tunnel are you speaking of?

Q I am speaking of the small tunnel, the little one that you spoke of.

A The 20 foot tunnel?

Q The 20 foot tunnel and the surface work that you said only went down a foot or two.

157 A Oh, that could have been done in a month's time.

Q And the other tunnel?

A The other tunnel—

Q (Interrupting) And the slope?

A Oh, two or three months' work.

Q How many men were up there?

A How many men?

Q Yes.

A Varying. Sometimes we had only three men, sometimes six or eight.

Q Well, for what length of time would you employ as many as six or eight?

A Probably not more than a year altogether, six or eight.

Q If you had six or eight men on there for a year and it took from sixty to ninety days to make the large tunnel and

the slope, and thirty days to make the small one, and two or three days for the tracing, then I assume that the balance of the time those men were on there to hold possession, were they not?

A They were prospecting different parts of the tract so as to see if there were other coal veins.

Q That section or the general tract of land up there?

A Of that section.

Q Of that section.

A We were only interested in that section.

Q What other openings did they make during all this time?

A Then the opening was made near the quarter corner on the west.

Q What was the evidence of the existence of this syndicate of yours?

158 A What is that?

Q What was the evidence, I say, of the existence of your syndicate, did you have any agreement, any written agreement?

A No sir.

Q Simply had a verbal agreement?

A Yes sir.

Q You filed on what particular portion of the section yourself?

A The syndicate—if I remember now a syndicate of four filed—

Q (Interrupting) What is that?

A If I remember correctly, a syndicate of four, an association is what the law terms it, an association I think filed —of four, files on the entire section, without subdividing it.

Q Mr. Sydney Williams said he filed on one portion of it, yesterday, and I asked him whether he was filing all by himself or in connection with others who were filing on other portions, and he said he filed all by himself, without any connection with anybody else. If he filed on one quarter section in connection with this thing, the rest of you must have filed on something else?

A Well, as I say, perhaps I am wrong in that, that it does require subdivision into four quarters. I was thinking that

an association could file on the entire section without subdividing, but that I am not sure of.

Q Isn't it a fact that at the time you filed on this section, or the portion of the section that you filed on, that you

159 filed on a certain portion of it and that you were obliged to make and did make an affidavit to the effect that you were filing on it purely and simply in your own behalf, for your own self?

A No sir, an association does not require that form, the law allows an association of four to be formed for the purpose of—

Q (Interrupting) But you didn't file on it as an association, did you?

A Yes sir.

Q Didn't you file on it individually?

A No sir.

Q Then you think Mr. Williams is mistaken?

A Yes sir.

REDIRECT EXAMINATION.

MR. TODD: I want to ask a question or two that might possibly have been direct, if you permit it, Mr. Spooner.

MR. SPOONER: Certainly.

Q (Mr. Todd) This tracing which I show you, have you marked the base of the mountain on that and the tunnels that were driven? Just describe it, Mr. Whitworth (handing tracing to witness).

A The tunnel marked in this northwest quarter, that is an error, there is no tunnel there. The tunnel was on the— in this part, which was the southwest.

Q Have you a red pencil?

A No sir.

MR. SPOONER: You will not offer that in evidence?

160 MR. TODD: I was going to, to illustrate his testimony.

Q (Mr. Todd) Did you draw this tracing showing the base of the mountain?

A Yes sir.

Q Is that correct?

A Yes sir.

Q Showing how the base of the mountain runs through this section and around it?

A Yes sir.

MR. SPOONER: I want to cross examine on the correctness of this.

MR. TODD: Yes.

Q (Mr. Todd) The tunnels or tunnel on the southwest quarter, and the other discovery tunnel and slope near the line between the east and west half of the east half, are correct?

A Yes sir.

Q But the tunnel as shown on the northwest quarter is a mistake?

A Yes sir.

Q It should not be there?

A No sir.

Q And the line indicating the base of the mountain is approximately correct?

A Approximately correct, yes sir.

MR. TODD: I wish to offer this in evidence to illustrate the testimony of the witness as to the topography of the land and the location of the tunnels.

THE MASTER: It is subject to cross examination, of course.

161 RECROSS EXAMINATION.

Q (Mr. Spooner) What lines have you put on there, Mr. Whitworth?

A I have indicated this as discovery, and I have indicated this as the tunnel, I have indicated the base of the mountain and I have indicated here a point, and I indicated that point and there—

THE MASTER: (Interrupting) Make your answers, Mr. Whitworth, so that they will be intelligible in the record.

A Shall I answer that again?

Q (Mr. Spooner) Yes, I guess you had better. What the judge means is, mention it with reference to this, these lines, so that by reading it in there and looking at this Judge Hanford can find out what you were saying.

A I have indicated the point of discovery and marked it "discovery"; I have indicated there the point where the tunnel and slope which is in the west half of the east half of the section; I have also indicated the summit of Sugar Loaf mountain; I have also indicated the approximate position of Sugar Loaf mountain; I have also indicated the tunnel in the southwest quarter of the section, this tunnel being near the northwest corner of that southwest quarter. I have also indicated a point here marked "tunnel" in the northwest quarter, which was an error.

Q You mean that that should be changed—the northwest quarter eliminated altogether?

A Eliminated?

162 Q Yes.

A I have also marked here outside of this section, which is in section 33, and near the northwest corner of the section, the approximate position of the tunnel driven on 33 towards 34.

Q You drew all the lines on this, then, except the outlines?

A Yes sir.

Q And the lines dividing the section into quarters?

A Yes sir; that is, I put them in pencil.

Q Yes, you put them in?

A Yes sir.

Q They are your lines?

A Yes sir.

Q You have marked here on this little plat or drawing your notion of the extent of the summit of this Sugar Loaf mountain and its location in the section. Have you ever made any data or measurements or anything to show the location in that section of this summit of Sugar Loaf mountain?

A I don't think I have made any surveys to show it, but it is a very prominent—

Q (Interrupting) Well, just answer my question as I ask you. Have you ever surveyed it? You know of you have, if you ever surveyed it?

A To show the summit?

Q For the purpose of finding out what proportion of this section and whereabouts in it is the summit of this hill?

A No sir.

163 Q You have never made any measurements of any kind or taken any observations of any kind with a view to finding how large this summit is?

A No sir.

Q When was the last time you were up there?

A My recollection was, as I stated, in 1902.

Q 1902. I was up there last week and I want to ask your confirmation of my recollection that this hill, the sides of this hill and the summit of it are largely covered with timber, that is, what they speak of as mining timber?

A Second growth timber, yes sir.

Q Second growth timber?

A Yes sir.

Q That is true, is it not?

A True, yes sir.

Q And your marking of this summit on here and its place in the section is derived from your recollection of how it looked to you and without any data, that is, any measurements or survey?

A No measurements to locate it, no sir; just simply observation.

MR. TODD: I offer this in evidence simply for the purpose of illustrating the testimony of the witness.

THE MASTER: Very well, it may be admitted.

Tracing referred to was marked complainant's exhibit "E", same being returned herewith.

(An adjournment was here taken until two o'clock this afternoon.)

164 N. H. MARTIN, produced as a witness on behalf of PLAINTIFF, having been first duly sworn, testified as follows:

Q (Mr. Todd) State your name?

A N. H. Martin.

Q Where do you live?

A At Renton.

Q How long have you lived at Renton?

A Three years.

Q What is your business?

A I have got no business now.

Q What has it been in former years?

A Well, I was some years with the old Seattle Transportation Company, running carrying coal from Seattle to Newcastle, and then I was outside foreman for the Oregon Improvement Company, and I was assistant—

Q (Interrupting) During what years?

A That was in 1876.

Q How long did you work for the Oregon Improvement Company?

A I worked for them for two years—four years at Newcastle, as outside foreman.

Q That was in 1876?

A Yes, from 1876.

Q What other experience have you had in mining?

A Well, I have not had very much experience, only I have been connected with looking after coal; never mined any?

Q What do you mean by looking after coal?

A That is sorting the different kinds of coal and seeing that the proper kind of coal was shipped, you know, cleaned.

165 Q Did you ever work at Franklin or in that vicinity?

A No sir.

Q Have you ever seen section 34?

A Yes sir.

Q When was that?

A The first time I saw it was in 1882.

Q How often have you seen it since that time?

A Twice.

Q What time was that?

A The second time, I think it was in 1884.

Q And when was the last time?

A I think it was in 1892.

Q Did you ever see any coal on the land?

A I did the first time I went there.

Q Did you the other times?

A No sir.

Q Where did you see it the first time?

A In 1882.

Q I saw where, on what part of the section?

A Well now, I can't tell you.

Q Where did you see it?

A I saw it in a small drift, a prospect tunnel that they had driven in.

Q What was the depth of the vein, if you remember?

A I should think—I measured it—oh, I think it was between four and five feet.

Q What was the character of the coal?

A It looked good to me.

Q Had you known of this section as coal land prior to that time?

166 A I always heard it was.

Q You have never been on there since 1892?

A No sir.

Q Do you remember the surface of the land about that vicinity on that section?

A Yes.

Q What was the character of the surface of the land?

A What do you mean?

Q Was it rough or smooth?

A Well, parts of it very rough.

Q Timbered or not timbered?

A There was timber, timber on a good deal of it.

Q What kind of timber?

A Well, small timber.

Q Could you state, or not, whether it was suitable for agricultural land?

A I don't think it was.

(No cross examination. Witness excused.)

J. C. FORD, produced as a witness on behalf of the PLAINTIFF, having been first duly sworn, testified as follows:

Q (Mr. Todd) State your name, please?

A J. C. Ford.

Q What is your business?

167 A Vice president and general manager of the Pacific Coast Company.

Q That company is the successor of the Oregon Improvement Company?

A Yes sir.

Q Have you in your office the old records and files of the Oregon Improvement Company?

A Why, some of them.

Q You have been served with a subpoena duces tecum to produce certain of them, have you not?

A Yes sir.

Q Have you with you a letter from John L. Howard, dated San Francisco, November 8, 1890, to C. J. Smith?

A Letter dated November 8th, from John L. Howard to C. J. Smith, yes sir.

Q Give me that, please?

A I don't want to leave that here, it is a part of our record. Just—if you could submit it to the court, I would prefer to leave a copy of it rather than the original.

MR. TODD: Do you want to see this, Mr. Spooner (handing paper to Mr. Spooner)?

MR. SPOONER: I think I have seen it.

Q (Mr. Todd) Who was the then manager of the Oregon Improvement company, if you know?

A I don't know.

MR. TODD: I offer this letter in evidence and ask leave to submit a copy of it for the record instead of the original.

MR. SPOONER: It is objected to as irrelevant and
168 immaterial.

THE MASTER: Objection overruled.

MR. TODD: You have no objection to a copy being put in the record instead of this.

THE WITNESS: You could mark the letter, if you wish, and I will see that a copy of it is sent up. I haven't got a copy of it here.

MR. TODD: Yes, if you will.

THE MASTER: If it is in accordance with your mind, you can read it into the record, let the shorthand reporter take it.

MR. TODD: All right, I will read it in the evidene later.

MR. SPOONER: I would just as soon you would have a copy, if you want him to send a copy up.

THE WITNESS: I will undertake to see that the copy is submitted.

MR. TODD: I have a copy of it.

MR. SPOONER: All right, any copy that you say is a copy will be satisfactory to us.

Letter referred to was marked complainant's exhibit "F", same being returned herewith.

Q (Mr. Todd) Have you also a letter there from John L. Howard to C. J. Smith, dated Decmebr 8th, 1890?

A What is the next?

Q The letter of December 8th, 1890, to C. J. Smith?

A Yes sir. I have that letter from John L. Howard to C. J. Smith.

Q Well, produce it.

169 (Witness produces paper.)

MR. TODD: I offer this letter in evidence as complainant's exhibit "G".

MR. SPOONER: I will make the same objection, as irrelevant and immaterial.

THE MASTER: Objection overruled.

Letter referred to was marked complainant's exhibit "G", same being returned herewith.

Q (Mr. Todd) Have you a copy from the records of the Oregon Improvement Company, or the original letter written by C. J. Smith to H. W. McNeal, dated December 9, 1890?

A I have.

Q What is that, the original or a copy?

A An original. They are all originals.

MR. SPOONER: The same objection.

Q (Mr. Todd) You are familiar with the signature?

A Yes.

Q Whose signature is that?

A I think that is Mr. Smith's signature. Mr. Todd I offer this in evidene as complainant's exhibit "H".

Paper referred to was marked complainant's exhibit "H". same being returned herewith.

Q (Mr. Todd) Have you a copy of a letter to John
170 L. Howard, Esq., signed by F. H. Whitworth, dated January 13, 1897?

A I have.

Q To which are attached a bill and a voucher, or are those a part of the same?

A I think there was a bill attached. The voucher was not a part of that attachment, it was probably made out later.

MR. TODD: I will offer that letter and the accompanying bill in evidence as complainant's exhibit "I".

MR. SPOONER: That is objected to as irrelevant and immaterial. There is nothing in that letter that has any connection or shows any connection between Mr. Smith—any knowledge about this land by Mr. Smith.

MR. TODD: I connect it up with the voucher here.

THE MASTER: Objection overruled.

Paper referred to was marked complainant's exhibit "I", same being returned herewith.

MR. TODD: I offer a voucher of the Oregon Improvement Company, C. J. Smith, receiver, for account payable to John L. Howard, manager, San Francisco, California, and approved by C. J. Smith, receiver and general manager.

Q (Mr. Todd) Do you know the signature on there under "approved"?

A I don't know whether that is Mr. Smith's signature or not. I don't look like it to me. I am not sure.

MR. SPOONER: Ask Mr. Smith.

MR. TODD: Of course he is not on the stand now.

MR. SPOONER: No, but that is all right.

(Mr. Todd shows paper to Mr. Smith.)

MR. SMITH: Yes, that is mine.

MR. TODD: I offer this as complainant's exhibit "J".

MR. SPOONER: That is objected to as irrelevant and immaterial.

THE MASTER: Overruled.

Paper referred to was marked complainant's exhibit "J", same being returned herewith.

MR. TODD: That is all, Mr. Ford.

THE WITNESS: Well now, can I take those documents and have copies made and send them in, certified to my myself?

MR. TODD: I have no objection.

MR. SPOONER: I have none. That will be all right.

THE WITNESS: Who shall I send them to?

MR. TODD: Send them to Judge Greene, the Master in Chancery.

A Judge Greene; all right.

(No cross examination. Witness excused.)

F. H. WHITWORTH, being recalled on behalf of PLAINTIFF, testified as follows:

Q (Mr. Todd) I show you here a letter marked complainant's exhibit "F" and ask you if you know that signature (handing paper to witness)?

A John L. Howard.

Q Is that the Howard you spoke of as being interested in this coal land together with you?

A Yes sir.

Q I show you another exhibit, marked complainant's exhibit "G", and ask you if you know the signature to that letter?

A Mr. Howard's.

Q That is the same Mr. Howard—

A (Interrupting) Yes sir.

Q (Continuing) —about whom you testified. I show you herewith a letter signed F. H. Whitworth and ask you if you know that signature?

A Yes sir, that is mine.

Q Do you remember the circumstances of writing that letter?

A Yes sir.

Q What were they?

A It is expressed in the letter here that—

MR. SPOONER: (Interrupting) This is objected to as irrevelant and immaterial.

THE MASTER: Objection overruled.

Q (Mr. Todd) Was it in connection with your testimony this morning, as to the expenses, in regard to the expenses of maintaining or exploiting the coal on section 34 testified here to?

173

A Yes sir.

Q I show you the signature on complainant's exhibit "J", to the receipt, "received—San Francisco, January 26—from C. J. Smith, receiver of the Oregon Improvement Company, $51 51-100. John L. Howard." Whose signature is that?

A Mr. Howard's.

Q That is the same Howard to whim you testified this morning?

A It is.

Q Mr. Whitworth, one question I overlooked in the examination this morning: What were the thicknesses of these veins of coal that you discovered on this land?

A At the discovery point the thickness of the lower bench of the vein was some upwards of 12 feet; at the tunnel and slope it was a little over 8 feet; the vein opened in the quarter corner on the west of the section was 10 feet; the vein opened on section 33, near the northwest corner of 34, was over 6 feet between the walls, but near the center there was a band of about six inches of rock, sand rock.

Q What is the nature of these veins as to being mixed with soil or gravel or other sediments?

A They were comparatively free of foreign matter.

Q How were they as to being regular or irregular?

A As far as traced they showed regularity.

174 CROSS EXAMINATION.

Q (Mr. Spooner) Mr. Whitworth, in 1897—that was before anybody had any homestead entry on this land, wasn't it?

A Yes sir, I think so.

Q (Continuing) —your syndicate had whatever possessory claim there was to that then, did you not?

A Yes sir.

Q Did you own it, whatever interest you had, in equal shares among yourselves?

A The Oregon Improvement Company had one third and the rest of us—I had two fifteenths, Mr. Maguire two fifteenths, Mr. Smithers two fifteenths, and Mr. Colman four fifteenths. I think that makes it out.

Q What business was Maguire in at that time?

A At that time he was keeping a saloon near the southeast corner of this section.

Q And what business were you engaged in at that particular time?

A In 1897?

Q Yes.

A In civil engineering.

Q Civil engineering?

A In the city.

Q Were you in business practicing your profession by yourself or with some one else?

A Yes, by myself.

Q You were not civil engineer for anything or anybody, but you were practicing generally, were you?

175 A Yes sir. I may have been an engineer for some company simply—

Q (Interrupting) Well, it was not exclusive?

A No sir.

Q That is what I mean?

A No sir.

Q Were you successful as a civil engineer at that time, or not?

A I made my living by it. Do you mean did I make much money?

Q Yes, I mean how was your business then as compared with what it had been in '95 and '96?

A I was doing fairly well.

Q As well as then, or not?

A Yes, I think so.

Q As well as in 1894, 1893?

A 1893 was a pretty hard year. I don't think I was doing very well.

Q At that time, along in 1896 and 1897, you had—previous to that time, as I understand it, you and your associates had spent about $8,000 on this property?

A Yes sir.

Q Did you regard it as being a particularly valuable piece of coal land?

A Yes sir.

Q At that time?

A Yes sir.

Q Was there any reason at the time for you to let go of it?

A Why, except that—to get money out of it.

176 Q Then I want to know why you wrote in this letter here as follows: "Don't you want to buy out some or all of our interest? Maguire and I would be glad to dispose of our share,—we each own two fifteenths,—at a low price. I think Gilman and Smithers would also."

A Because we had been carrying it for some time, and, to open a coal mine up, it costs a good deal of money, and didn't any of us have the ready money then to put in to open a mine, except Mr. Howard, for the company.

(Witness excused.)

C. J. SMITH, produced as a witness on behalf of the PLAINTIFF, having been first duly sworn, testified as follows:

Q (Mr. Todd) Mr. Smith, how many years were you general manager of the Oregon Improvement Company?

A Well, in one position or another, about seven years.

Q What years did that cover?

A From 1891 to about 1898.

Q What was the chief business of the Oregon Improvement Company during those years?

A Well, railroad, steamship, coal.

Q What was the extent of its coal holdings and operations at that time?

A Well, they owned the Franklin and Newcastle mines.

177 Q Those were the only mines that they owned at that time, were they not?

A Yes.

Q Mr. Smith, at the time you purchased this land from the homesteaders, what position did you occupy with the Washington Securities Company?

A The Washington Securities Company was not formed at that time, it was just in process of being formed.

Q It was in process of being formed?

A Yes.

Q And you purchased this land for the corporation which was to be formed, did you not?

A Yes.

Q And with its funds?

A Yes sir.

Q What position did you hold in the Washington Securities Company upon its organization?

A Vice president.

Q What other position—were you one of the trustees or directors?

A Yes.

Q Were you one of the original promotors of the company?

A Well, I subscribed to the stock at the beginning, at the formation of the company.

Q Did you interest the corporation in this particular piece of property?

A Well, I brought it to their attention, yes.

Q And you are still and at the time you deeded the property over to the company you were the vice president and one of the trustees?

178 A Yes sir.

Q And you had bought it solely for the use of the corporation which was afterwards to be formed?

A Yes.

Q During the time you were connected with the Oregon Improvement Company did you visit the Franklin mine from time to time?

A Yes sir.

Q How often would you say?

A Well, I don't remember; whenever it was necessary.

Q Once a month?

A Well, it was—the periods were too irregular.

Q The Oregon Improvement Company owned the railroad that ran up there at that time?

A Yes sir.

MR. TODD: That is all.

THE WITNES: Columbia & Puget Sound.

CROSS EXAMINATION.

Q (Mr. Spooner) Mr. Smith, he asked you whether or not you brought to the attention of the Washington Securities Company this piece of property. In what way did you bring it to its attention and in what way was it brought to yours?

A A man—

MR. TODD: (Interrupting) I object to that form of the question which asks him what way it was brought to Mr. Smith's attention, as that is not proper cross examination.

179

THE MASTER: Let him answer.

A A man by the name of Braggs came to me and told me he had some coal land, wanted to know if I was interested in coal, and I asked him where the land was. He told me it was in section 34, township 22, seven, I think it was, and I told him that I was not, that I didn't believe that I cared to be interested, and he asked me if there was anybody that he could obtain as a purchaser, that he had an option on the land. I referred him to C. R. Collins, who at that time was hunting for some coal land with the expectation of getting coal that would be adaptable for gas purposes. He had some negotiations with Mr. Collins and Mr. Collins came to me and said that he would take it if I would take an interest, which I declined to do; and Mr. Collins took it up with some people in the east, and, not obtaining the necessary funds, told Mr. Braggs that he was unable to carry out his plans; and Braggs came back to me again, and in the meantime the Washington Securities Company was about to be formed and their stock was then being subscribed, and I referred Mr. Braggs to the Securities Company. He had a talk with Mr. Clise, who expected to be the president of the company and who was promoting it—forming it, and Mr. Clise discussed the question with me and Mr. Braggs, and I told him that—I gave him the name of an engineer—mining engineer, that would exploit the land, that is, would make examination, and that I knew nothing personally about the land myself, but would rely upon a report that this man would make; and, at my suggestion, the man was employed to go there and look the

180

land over. After he had looked it over the matter of purchase was taken up between myself and Mr. Braggs and an option was taken for a sufficient length of time to enable us to verify the report of the engineer, and, upon the verification of those reports and the abstract of title, the land was purchased.

REDIRECT EXAMINATION.

Q (Mr. Todd) You then bought the—you and the company then bought the land for coal land?

A Yes, after the examination had been made, the report was satisfactory.

(Witness excused.)

The further hearing of this matter was continued to sometime to be agreed upon by the Master and respective counsel.

181 December 8th, 1909, 2 o'clock p. m. Continuation of proceedings pursuant to agreement.

All parties present as at former hearing.

LAWRENCE J. COLMAN, produced as a witness in behalf of COMPLAINANT, being first duly cautioned and sworn, testifies as follows:

Q (Mr. Todd) Please state your name?

A Lawrence J. Colman.

Q Where do you reside, Mr. Colman?

A 716 Fourth Avenue.

Q In Seattle?

A In the city of Seattle.

Q How long have you lived in the city of Seattle?

A Since 1872.

Q What experience have you had in coal mines, or any kind of mines?

A Six years—six years experience in coal mines.

Q Where was that?

A Principally in Cedar Mountain Coal Mine.

Q What years were those?

A From 1884—it was eight years—from 1884 to 1892.

Q What was your experience in the Cedar Mountain Mine?

A The character?

Q Yes, the character of your experience?

A Well, assistant manager, you might describe it, and also engineer, that is, I did the civil engineering.

Q You were a civil engineer by profession?

A No; I never engaged in it; only I took a civil en-
182 gineering course in the university here.

Q Did you receive a degree?

A No.

Q Did you ever have occasion to examine other coal properties than that at Cedar Mountain?

A Yes.

Q Did you ever examine section 34 township 22 north range 7 east Willamette Meridian?

A Yes sir.

Q When was that?

A I have some notes here with me that were taken.

Q Are those notes you made at the time of the examination?

A Those are the notes (producing notes).

Q When was the examination made?

A February 16, 1892.

Q Did you make your examination alone; do you remember?

A No. In company with F. H. Whitworth.

Q What parts of the section did you examine?

A I went all around the section, and over a large portion of it.

Q Just state what the topography of the section is, as to being level or hilly?

A Well, I went around the section, because the outer portions of the section are more nearly on the level; the central portion is quite high.

Q How high?

A I never measured it.

Q Can you approximate it?

A Well, I should say from eight hundred to a thousand feet, but it would be quite a guess; I never have been
183 on the top of it.

Q What is the character of the land, as to being timbered or otherwise?

A Quite heavily timbered in places.

Q Had it been logged off at that time?

A No.

Q Is it valuable for logging purposes?

A Portions of it would be.

Q Do you remember what portions of the section?

A I should say the northeast quarter possibly, had the heaviest timber.

Q What was the agricultural character of the land, of the whole section?

MR. SPOONER: I object to that as incompetent and he has not attempted yet to show any qualifications in this witness to state the agricultural character of the land.

(Objection overruled. Exception noted for respondent.)

A The east half of the east half is what is known as upper bottom. There was considerable bottom on that and, I should judge, would be quite desirable for agriculture.

Q What about the rest of the section?

A The rest of it would be very much less so.

Q What is the character of the soil, did you notice that?

A In two or three places along where excavations were made in searching for coal, it was a yellow loam, outside of this bottom place that I spoke of.

Q Did you find any evidences of coal on the land?

A Yes sir.

Q What evidences did you find?

184 A At the south quarter section I saw coal in its natural position.

Q You mean that is on the southeast quarter?

A No, the south quarter section post.

Q The south quarter section post?

A Yes; and at a point about 810 feet, the notes here show; at a point 810 feet easterly and about 400 feet northerly there was an opening made into the coal vein.

Q What was the evidence of coal at the south quarter section post?

A Just a prospect hole excavated down to the coal and cut through to show the depth of the vein.

Q At what other points on the section did you find coal, besides the two you mentioned, if at all?

A Only one other place.

Q Where was that?

A The northeast corner of the southwest quarter.

Q What evidence was there there?

A Well, there were men working there. We had men working there at that time, and there was a perpendicular pit and probably from fifteen to twenty feet of tunnel.

Q Did you examine the coal, to ascertain as to its quality?

A I had it analyzed.

Q What was the result of the analysis?

A Of what vein?

Q Well, just describe the results from the different veins?

A I have a copy here of the analysis made from three points. In the northwest corner of the southeast quarter, that is

185 the last described prospect, the analysis by J. M. Dowley of this city was—shall I give it?

Q Yes.

A Moisture 4 per cent, volatile matter 33 per cent, fixed carbon 48 per cent, ash 14.21, sulphur .75 of one per cent.

Q What did the analysis show of the coal taken from the other two places?

Q The coal taken from the west half of the east half of the section, near the south line, by the same party; analyzed, moisture 2.05—2 per cent and the .05 of 2 per cent; combustible matter 33.06, fixed carbon 51.01, ash 13.42 and sulphur .46 of one per cent.

Q Was any analysis made of any coal taken near the quarter post, or was that the one to which you referred?

A This is from the main tunnel, about 800 feet from the quarter post.

Q Was there any other test made besides those two?

A There was one more, but that was from coal taken on section 33, 400 feet from this.

Q That is not the tunnel that was being sunk into section 33, in the direction of section 34, on the northwest quarter of it—was that coal of the same character?

A No; it is quite a little different.

Q Just state what the test showed on that coal?

A 5.51 per cent moisture, 38.03 combustible matter, 43.03 fixed carbon, 13 per cent ash and .43 of one per cent sulphur.

Q Did you make any examination to determine the position of the different veins of coal on the land?

A Yes sir.

186 Q What did you find from that examination?

A This vein that is in section 33, taking into consideration the dip and the strike, would run under this high hill in the center portion of this section 34.

Q Did you ascertain the thickness of that vein?

A Yes; I have a cross section of it here.

Q What does it show, as to the thickness of the vein?

A 64 inches of coal and nine and one half of shale and slate.

Q Did you ascertain the thickness of the vein at the south quarter post?

A Yes. Right here I have that cross section.

Q And what is it?

A I have taken two or three cross sections. They vary slightly. This one, taken at the face of the gangway at this date, showed 84 inches of coal and two and three fourths inches of sandrock shale—clay partings.

Q Did you measure any other veins on the section?

A These in the northeast corner of the southwest quarter, I did.

Q What was the size of that vein?

A Ninety-one and one half inches of coal and thirty inches of sandrock and bone and clay.

Q Were those veins which you mentioned all different veins of coal, or do they run into each other, in your opinion?

MR. SPOONER: I object to that as incompetent and something which no one can possibly tell from the investigation which Mr. Colman says he made there.

MR. TODD: I am asking him for his opinion upon

187 it from the examination he made.

THE MASTER: The objection is overruled.

(Exception noted for respondent.)

A Well, the cross sections are so different that there is very little likelihood of their being on the same vein. The strike and dip that they had would not lead one to believe that they were the same.

Q From the examination which you made, state from your experience as a coal mining man, whether there was coal on the land in sufficient quantities to pay for mining it?

MR. SPOONER: This is also objected to as incompetent.

(Objection overruled. Exception noted for respondent.)

A Will you repeat the question, please.

Q From the examination which you made, state, from your experience as a coal mining man, whether there was coal on the land in sufficient quantities to pay for mining it?

A I think there was.

Q From your examination of the section which you made, state from your experience, whether in your opinion, the land was more valuable for mining, timber or agricultural purposes?

MR. SPOONER: I object to that as incompetent. Mr. Colman was put on here and asked as to his qualifications as a coal mining man and he gave them. Now, that is not all that is necessary in order to answer this question.

(Objection overruled. Exception noted for respondent.)

A I should say more valuable for mining.

188 Q Have you had experience in timber; have you purchased or owned any timber land?

A A limited amount.

Q Have you ever cruised any timber?

A Not officially, only for my own purposes.

Q Not officially?

A Well, I am not an expert in timber.

Q For what purpose, in your opinion, is this section most valuable?

A For mining; for a coal mine.

Q Can you state how valuable it was for mining purposes, in your opinion, that is whether you consider it good coal land, or otherwise?

A On the evidence of having coal in considerable qualtities as shown by the excavations at the three points.

Q Besides those excavations were there any outcrippings of coal on the land?

A I saw none. There is a great deal of deposit over the whole surface. There is no place that I know of on the land that the natural rock crops out.

Q How long prior to your examination on that section had you known of it and its character?

A Ten years.

Q What had you understood the character of the land to be?

MR. SPOONER: I object to that as irrelevant, immaterial and hearsay.

(Objection sustained.)

Q What kind of land had you known it as, during those ten years.

MR. SPOONER: We make the same objection.

189 MR. TODD: The allegation in the bill is that this land was known to be coal land.

(Objection overruled. Exception noted for respondent.)

A We had been dealing with it and paying for this prospect work upon it as coal land during that period.

Q You had been on the land previous to your examination of 1882?

A But once before.

Q Do you remember what year that was?

A It was only a short time; I have forgotten, but it was less than a year before that.

Q When did you first hear of this land as coal land; do you remember?

A Between 1880 and 1882.

Q You had not then been upon the land?

A I had not.

Q You were interested in other coal lands at that time?

A No, I was working for a company that was, and so I knew of it.

Q I understood you to say that the east half of the east half is bottom land, and in your opinion is agricultural land?

A I think it is good agricultural land.

Q Did you find any evidences of coal upon that part of the section?

A. No.

Q From your examination of the veins on other parts of the section, could you determine whether there was coal on the east half of the east half?

A We judged there was. The other portion would 190 not be valuable for coal unless the coal should be in large enough deposit to go under the whole section.

Q In your opinion then, from your examination, there was coal under the east half of the east half?

A I should say there was. We found coal at one point at the center of the section and then 800 feet towards the east half of the east half, which would be about 500 feet from that line. No one can tell what happened in that 500 feet, but there was 800 feet of the line that there was coal, in that direction.

Q What was the dip of the different veins which you examined?

A The vein in the southern portion of the west half of the east half, at the face of the tunnel it was 23 degrees pitch, and the strike varied—the opportunity to determine the strike was limited, but it was very nearly east and west.

Q The dip was 23 degrees, which way?

A North.

Q That is, it dipped down towards the north?

A Yes.

Q Could you tell what direction it ran towards the east, or did it continue?

A It ran within two degrees of east and west—the strike.

Q And dip was twenty-three degrees towards the north?

A The dip was twenty-three degrees towards the north and the strike was within two degrees of east and west.

Q And what was the dip of the other veins; the dip and strike I mean?

A The vein in the northwest corner of the south- 191 east quarter—a rough estimate of the strike was north-west, but the portion to check this from was so limited that I would not consider that very reliable.

Q Did you ascertain the dip of that vein?

A The dip was between three and seven degrees. It was quite flat at that point, towards the north.

Q The vein over on the west of the section line?

A I have that accurately here. The dip varied from thirty to thirty-seven degrees at different portions of the places

tested, towards the northeast; and the strike was southeast; it was south sixty-seven and a half degrees.

Q How long were you in making that examination of the section, in 1892?

A I think a portion of three days.

Q And Mr. Whitworth was with you during that time?

A He was.

CROSS EXAMINATION.

Q (Mr. Spooner) Mr. Colman, is it a fair statement to say, as summing up your testimony along the line I am speaking of, that from what you saw there you considered it a good coal prospect—it was not a mine yet, was it?

A It was not a mine.

Q From what you say had been opened up and what you saw there, it was a good prospect, is that right?

A I think any mine is a prospect until it is producing profitably.

192 Q Don't you make this distinction between a mine and a prospect; that a mine is where the prospecting stage has been past, and where a certain amount of ore has been shown to be sufficient to fix it as a remunerative thing, to some respect, and the prospective something which is merely indicative, isn't that it—isn't that a fair distinction?

A Well, that is due to the equation of the individual and his hopefulness. I consider two of the veins were so distinctly hopeful that it was worth going ahead on. I think the other vein had not been developed at that time. The vein in the northeast corner of the southwest quarter was merely a prospect.

Q Is it not a fair statement to say that the one you spoke of last was merely a fair prospect, and the others were better prospects—neither was a mine?

A Neither of them was a coal mine.

Q Neither of them was a mine—now, your statement which I understood you to give as your opinion, as to this section being more valuable for coal mining than for any other purpose, is based upon your opinion of the probability that the prospects would turn out to be mines, isn't it; that is, you

would not state, would you, positively, as your opinion, that the section was more valuable for coal mining purposes than for any other purpose, based merely upon the strength of what coal you saw there; but it is on the theory that the probability is, if the prospects develop into mines, it would be worth while to open them up?

A Of course, no human being can absolutely swear

193 that there is coal where he has not seen it, but that is the only way a coal mine is developed.

Q How about my statement; is it not a fair statement of the effect of your testimony; your opinion, I say, that this this section was more valuable for mining than any other purpose, is based upon the probability, in your opinion, that these prospects would turn out to be mines?

A Certainly.

Q When did you cease to have any interest—I do not mean sentimental interest, but any other interest—any material interest—in this section?

A Well, I haven't the date; it was after going up there, when we met with more resistance than we felt we wanted to fight against, and the land office here did not give us the protection that we thought we ought to have.

Q Were you interested in it at the time it became a question whether you could get it for coal purposes, or these homesteaders could get it for homestead purposes?

A Yes.

Q Mr. Sidney Williams stated that some effort was made on your part—not you personally but those people you were associated with—in the way of a contest to get this for coal purposes, and that it was turned down by the land office here; is that right?

A Yes.

Q What was the nature of that effort that was made to convince the Government Land Office here that it should not be obtained for homestead purposes, but was properly coal mining land, as you remember it?

A I am not familiar with the details of that. Mr.

194 Whitworth really handled it. I went up there at the time we were forced off—I was personally on the land.

Q You know there was a showing made before the Land Office here, as against those homesteaders?

A I am not sure to what extent that was—there was some legal proceedings in the county.

Q There was some showing?

A I am not prepared to say.

Q I understood you to say that the Land Office did not give you the assistance you thought you should have had?

A Yes; and yet personally I do not know; that is only through Mr. Whitworth. You would have to take his testimony as to what extent that was.

REDIRECT EXAMINATION.

Q (Mr. Todd) When you say that neither of those holes in the ground were coal mines; please explain what you wish to be understood as meaning as a coal mine?

A A coal mine is a mine that is producing coal.

MR. SPOONER: I object to that as improper.

(Objection overruled.)

A (Continuing)—producing coal for use.

(Witness excused.)

195 L. S. BROCKWAY, produced as a witness on behalf of RESPONDENT, being first duly cautioned and sworn, testified as follows:

Q (Mr. Spooner) State your name in full, Mr. Brockway.

A L. S. Brockway.

Q What is your business?

A Secretary of the Washington Securities Company.

Q You went up to this section 34 with some of our witnesses, didn't you?

A I did.

Q Do you remember the date?

A The 26th of October and the 18th of November.

Q At which time did you go up with Mr. Harrington and Mr. Beal?

A The 18th of November.

Q Whom did you have with you besides those gentlemen?

A I had no one at that time—having been up there before.

Q Were you acquainted with the directions?

A Yes.

Q Did you find the section corner post?

A Yes.

Q —which indicated your land?

A I did.

Q You had a compass with you?

A I did, yes sir.

(Witness temporarily excused from the stand.)

196 L. C. BEAL, Jr., produced as a witness on behalf of RESPONDENT, being first duly cautioned and sworn, testified as follows:

Q (Mr. Spooner) State your full name?

A L. C. Beal, Jr.

Q Where do you live?

A Vashon, King County, Washington.

Q How long have you lived there?

A Between ten and eleven years.

Q What business are you engaged in?

A Florist and gardening.

Q How long have you been engaged in that business or anywhere else?

A I have been in that business a little over ten years here and I was raised on a farm in the east, in Maryland.

Q What if any farming experience had you had previous to going to Vashon?

A I was on a farm in Maryland; I was raised, and, like all the boys on a farm, I had to work until I was about fifteen or sixteen years old and then I was in the general mercantile business for seven or eight years.

Q Have you ever examined section 34, township 22 north range 7 east?

A Yes sir, parts of it.

Q I wish you would state what is the nature of the soil from your examination and your experience, what is the nature of the soil of that section, so far as you examined it, and for what purposes it is suited?

A Why, the parts that I noticed were the south-
197 easterly portion. It seemed to be a sandy loam, and gravelly loam, and parts of it clay soil, where I could tell it; and that kind of soil is generally very good for fruit raising and also for stock raising.

Q What would you say, from your examination of the section or so much of it as you examined, as to its suitability for agricultural purposes?

A Very good.

CROSS EXAMINATION.

Q (Mr. Todd) Mr. Beal, was the part of the land you examined cleared?

A No, it was not cleared; there was several tracts that was cleared.

Q The part that you examined was covered with what kind of growth?

A It is what we would term a second growth fir, and some vine maple and some of the soft maple. What I mean by second growth—the trees were small and from the evidences there seemed to be a burn over there a great many years ago; that was the reason I call it a second growth.

Q The land is not cultivated now?

A Oh no, no.

Q It would be valuable for what kind of crops, in your opinion?

A Why, for fruits and, of course I don't know anything about whether it would raise grain—of course it would
198 raise grain if it was cleared, but west of the mountains we don't raise very much grain. I think it would be very good for grass and the like of that.

Q What business are you now engaged in?

A In the florist and gardening.

Q With Mr. Harrington?

A Yes; I have greenhouses on Vashon.

Q Your gardens are over at Vashon Island?

A Yes; we run a farm in connection with the green houses.

Q Are you familiar with land values, for the purposes which you mention that this land is suitable for?

A Somewhat, not very much.

Q Land, in the condition that that land now is, at the distance from Seattle that that land is now, covered with the growth that that land now is covered with, is, in your opinion, worth how much an acre?

A I could not say, because I am not familiar with the values at that distance.

Q You are only familiar with the values of land that is cleared near Seattle?

A I know the condition of land near Seattle—land in that condition of the same quality on Vashon Island would be worth anywhere from sixty to one hundred dollars an acre, and one hundred and fifty, according to the location.

MR. SPOONER: There is one question that I want to ask the witness.

Q State what, if any, suitability it has for gardening purposes, such as truck gardening?

199 A That lowland there, if there is a market close by, that lowland there, from all appearances, would be very good for truck gardening.

Q (Mr. Todd) That land, for gardening purposes, would not be nearly so valuable as the land on the Vashon Island in the same condition?

A Well, if it was in the same position.

Q I mean, at that distance from Seattle?

A No, not at that distance, I should not think so, unless there was a local demand.

(Witness excused.)

200 C. M. HARRINGTON, produced as a witness on behalf of RESPONDENT, being first duly cautioned and sworn, testified as follows:

Q (Mr. Spooner) State your name in full?

A C. M. Harrington.

Q Your are in the florist business?

A No sir.

Q What is your business?

A Farming

Q On Vashon Island?

A Yes sir.

Q How long have you been in the farming business here and elsewhere?

A Ever since I was old enough to work, practically, I have been identified with the soil ever since then, with short exceptions.

Q Have you examined section 34, township 22, north range 7 east?

A Portions of it.

Q You were up there at the same time Mr. Beal was?

A Yes sir.

Q From the examination you made, I wish you would state what, if any, suitability that land has for agricultural purposes, and for what agricultural purposes, if any?

A Well, I think it is fine agricultural land.

Q State what elements you take into consideration in arriving at that conclusion?

A Soil and climatic conditions?

Q What evidences are there on the land which lead you to draw that conclusion?

201 A The appearance of the soil and the growth on the land.

Q What is the nature of the growth which helped you in arriving at your conclusion?

A Why, vine maple and soft maple and scattering ash, and once in a while cedar and spruce.

Q What is the significance of that?

A You never see those growths on poor land; you never see the maple growing on poor land.

Q I would like to ask you whether or not there was anything in the contour or topography of the section which would make it inherently unfit for agricultural purposes?

A Only a small portion.

CROSS EXAMINATION.

Q (Mr. Todd) What portions of the section did you examine, Mr. Harrington?

A We examined the southern and the eastern.

Q Was your attention called to the hill there known as Sugarloaf?

A Yes sir.

Q Which direction from that did you make your examination?

A South and east.

Q How near did you approach the summit of that hill?

A Oh, I should judge, perhaps, one third of a mile or something like that.

Q You examined it until the rise became more precipitous?

A No sir.

Q You examined only the low land then?

202 A We examined some of the higher lands but we did not examine Sugarloaf Mountain.

Q And over to the west of the mountain you did not examine?

A Yes.

Q You did examine to the west of it?

A Yes.

Q And to the south of it?

A It was south and west.

Q And east?

A Yes.

Q You came in on the east side of that, didn't you, on the trail?

A We came in on the southeast; we came in at the section corner, that is, southeast of the mountain.

Q What portion of the 640 acres comprised in that section, would you say that you examined?

A Well, I was in a position to form a pretty good opinion of probably about three quarters of the section.

Q Did you go on the northwest quarter of the section?

A No sir.

Q Did you go on the northeast quarter of the section?

A I was where I could see it, where I could overlook it.

Q You did not go on it—you did not step on the land?

A No sir.

Q You only went on the southwest and southeast quarters of the section—actually went on them, I mean?

A I was where I could see it, in a position to form an opinion of more than that southwest and southeast.

Q What I want to know is what you actually went on; it was only on those two quarter sections, wasn't it?

203 A Well, that would be all that we actually set our feet on, but as far as forming an opinion of its agricultural value, I know by the growth on the land without going on it that there was no particular change in the character of the land.

Q The whole section was covered with this soft maple and the other kind of maple which you described?

A In a lesser degree on the high land, but still there was maple on the high land.

Q You were up there on November the 18th?

A Yes, I think that was the time.

Q What time did you get up there?

A A little after twelve.

Q What time did you start back?

A At 5:10, I think it was, practically.

Q That is, you caught the train at 5:10?

A Yes.

Q And the train got up there at noon?

A Yes, practically noon.

Q Did you spend all the time between trains on that section?

A Nearly all the time.

Q You are familiar with the value of the land in this county for agricultural purposes, are you not?

A You mean commercial value?

Q I mean the market value?

A Well, I would not want to say that I was qualified to go out and assess land, or anything like that.

Q You know in a general way what values are?

A I know something of it.

Q You know what the value is of that character of

204 land on Vashon Island?

A Yes sir.

Q What is the value of land for agricultural purposes, of that character, on Vashon Island where you live?

A That would depend a great deal on its location on Vashon Island.

Q Do you mean its accessibility to the waterfront?

A Yes sir, somewhat, and the view.

Q I mean, for agricultural purposes without any view; what is land worth over on Vashon Island of the same character as this land which you have described?

A About seven or eight hundred dollars an acre.

Q For agricultural purposes, on Vashon Island?

A Yes sir.

Q Will you pay that much for land on Vashon Island?

A No sir.

Q How much is that land which you viewed worth an acre for agricultural purposes?

A At the present time?

Q Yes.

A I don't know.

Q Is it worth as much as land on Vashon Island?

A Indeed no.

(Witness excused.)

205 H. HARRINGTON, produced as a witness on behalf of RESPONDENT, being first duly cautioned and sworn, testified as follows:

Q (Mr. Spooner) Mr. Harrington, you are in business as a florist?

A Yes sir, I am interested in it.

Q What experience have you had, if any, which would fit you to judge of the suitability of land and soil for agricultural purposes?

A Well, I am fifty-eight years old and I have always worked on the soil, farming. Of course we had lots of green houses in later years, but we had quite a farm connected with it; but I was brought up on a farm and have always been—well I have been in the greenhouse business thirty years but at the same time I have always had farming land outside.

Q You examined this section 34 that is concerned in this suit?

A Yes sir.

Q I wish you would state to what extent you examined it and what, if any, suitability for agricultural purposes you found it to have?

A Well, I went over the same ground that the rest of them did, that has been discussed here. We were together, and as far as I went—as far as I could see I found it was excellent ground.

Q You found it was excellent ground?

A Excellent ground, away above the average of the land that is under cultivation in this state.

206 CROSS EXAMINATION.

Q (Mr. Todd) Mr. Harrington who just testified is your brother?

A Yes sir.

Q You went on the same portions of the land he did?

A Yes sir.

Q And you went up there and came back the same afternoon, about five?

A Yes sir.

Q You did not go over the whole section by any means?

A No, no, it was too hard a tramp.

MR. SPOONER: I want to ask another question:

Q You have heard your brother's testimony?

A I am a little deaf; I heard some of it.

Q I want to know what, in a general way, is the growth on that land?

A Well, it is very peculiar. It is a second growth, and there is no first growth stumps except occasionally one that is left. I can't hardly account for it, and there is no down timber there.

Q What is the nature of the trees; what are the trees on it?

A Well, the second growth I spoke of, is fir, and there is quite a great deal of maple and soft maple and vine maple.

Q What, if any, effect upon your conclusion as to the suitability of the soil for agricultural purposes, does the presence of those maples on the land have?

A It shows the character of the soil.

Q Were you able to judge of the character of the
207 soil on that portion which you did not go on, by the presence of the growth which you saw on it?

A I was able to judge of about three quarters of the section. We went up the railroad going north and we could see that the land continued on practically the same level. Of course we did not go at all on what I would say would be the northwest quarter of the section, but I got a good view of it—that was the highest land—we didn't go there.

(Witness excused.)

208 L. S. BROCKWAY, recalled in behalf of RESPONDENT, testifies:

Q (Mr. Spooner) At one of the times when you went up on this section, you took with you a photographer for the purpose of having some photographs taken, didn't you?

A I did.

Q Have you seen the photographs since they were taken?

A I have.

Q I want to hand you this photograph here and I will ask you what it is a photograph of?

A That is a photograph of the southwest quarter known as the Barbee clearing.

Q I wish you would state whether or not, from your knowledge, that is or is not a reasonably correct representation of what it purports to represent?

A Yes sir, it is.

Photograph identified by the witness is marked "respondent's identification No. 1."

Q I now wish you would examine all of these photographs and then state what they are representations of, mentioning each one separately so that the reporter can identify them?

MR. TODD: I would like to ask a question first.

Q These photographs were taken last October?

A They were, yes sir.

Q Was Mr. Starkey with you at the time, the witness who previously testified for the complainant?

209 A Yes sir.

Q And he pointed out those places to you as being the different places they are represented to be?

A Yes sir.

MR. TODD: That is all.

MR. SPOONER: Go on.

A This marked "identification number 2" is the west half of the east half. This marked "identification No. 3" is the east half of the east half. This marked "identification No. 4" is the east half of the east half from another view. This marked "Identification No. 5" is a picture of the mountain taken from the southeast corner of the section. This marked "Identification No. 6" is the northwest quarter. And this marked "Identification No. 7" is the same quarter from another position, and this marked "Identification No. 8" is the mountain from the northwest quarter.

Q Mr. Brockway, are those photographs, from your knowledge of what they are photographs of, reasonably accurate representations of what they purport to show?

A Yes; although I do not think they show the clearings as large as they are.

(Witness excused.)

210 C. J. SMITH; recalled on behalf of RESPONDENT, testified as follows:

Q (Mr. Spooner) Mr. Smith, I would like to ask you, as far as you recollect, what is the first date, or substantially the first date you ever heard of this section that is involved in this litigation?

A Either in the latter part of 1890 or the beginning of 1891, I do not remember which.

Q At that time you were with the Oregon Improvement Company?

A Yes sir.

Q What was the date of your purchase of this section for the Washington Securities Company?

A I think it was in 1906.

Q I would like to ask you what knowledge, if any, you had during the time you were connected with the Oregon Improvement Company, of the character of this section?

A I had no personal knowledge whatever.

Q I would like to ask you whether or not at the time,

between the time you left the Oregon Improvement Company and the time you were first approached upon the subject of buying this section, whether or not you had acquired any information as to the character of this section?

A I had not.

Q I believe you testified when Mr. Todd had you on the stand, if I am not mistaken, the circumstances under which you bought it; that is, as I remember it, you spoke of and detailed your being approached by a man who represented these homesteaders, didn't you?

A Yes sir, Mr. Brooks.

211 Q Up to the time you were approached by the representative of these homesteaders with the view of selling this land, I would like to ask you whether or not you knew that it had been taken up as a homestead or in any other way?

A I did not.

Q About how long before the actual purchase was made by you, were you first approached about it?

A I should say six months—three months, probably. Mr. Brooks came to me and stated he had an option, and wanted me to interest myself in the matter, and I refused at that time to do; I declined to take any interest in it, but I directed him to Mr. Collins who had been looking for coal lands. He had some talk with Mr. Collins. Mr. Collins came to me and stated that if the land could be examined and found to be coal land and I would take an interest with him that he would take up the land. I declined at that time to do it. And a month or something of that sort elapsed, I do not remember how long, and Mr. Brooks came to me and told me that Mr. Collins had given it up, and his option was about to expire, and in the meantime this Washington Securities Company had been virtually formed—the formation of it had been virtually agreed upon, but the organization had not been perfected, and I referred him to the Washington Securities Company, and on the discussion of the matter with the president of the company at that time, he agreed to look into the matter if I would have an examination made of the property and see whether there was any coal on it, and I sent a man

up there who spent some considerable time looking over the property and making the examination, and it was upon
212 his report that the president of the company agreed to purchase it, but the company not being formed at that time, he requested that I take the title in my name and transfer it to the company when the legal organization of the company was perfected.

Q So far as any information that the company had of the character of this land, it was the same information, or lack of it, which you had?

A I could not find anything—I had no knowledge of any information at the hands of the company that indicated the value of the property. The only information I had was a letter from the former manager of the company, who was then located in San Francisco.

Q You are speaking of the Oregon Improvement Company now?

A Yes sir.

Q I am speaking of the Washington Securities Company.

A They had no knowledge whatever.

Q Your knowledge was their knowledge?

A Yes, that is all, and their knowledge was largely that which was acquired from the report.

CROSS EXAMINATION.

Q (Mr. Todd) When you say you had no personal knowledge of the character of the land during the time you were manager of the Oregon Improvement Company, you mean you never had been on the land?

A I never had been on the land and I never had any reports of its value.

Q You, as manager of the company, paid the ex-
213 penses for keeping up the coal declaratory statements on it?

A We did, indirectly. The reports were made to Mr. Howard in San Francisco, and at the request of the president, we refunded him that money, in order to have, if possible, any information there might be connected with the land. There was not in the office of the company, according to my recol-

lection, and report or anything that indicated the value of the land, and, within my recollection, that is as far as I recollect, there was nothing in Mr. Howard's office, because I have an indistinct recollection of his writing up and asking if some one would make a report on it before he went ahead with any more expenses.

Q You were paying the expenses on it then as coal land though?

A Yes, we were refunding to him the expense—a portion of the expense that he was paying for some people exploring and locating our land—I don't know what they were doing in fact.

Q Mr. Howard's interest, presumably, were in trust for the Oregon Improvement Company?

A I assume so.

Q When you purchased the land you had an abstract of title brought down and examined?

A I had an abstract, yes sir.

Q By your attorney, or the attorney of the company?

A By the attorney of the company.

Q Who paid for the examination of the abstract?

A The company.

Q And that attorney was one of the directors of
214 the company, was he not?

A I don't know.

Q You do not remember what attorney examined it?

A H. R. Clise.

Q Is he not one of the officers, and was he not the first secretary of the Washington Securities Company?

A I do not remember. No, I do not think he was. I am not sure about that.

REDIRECT EXAMINATION.

Q (Mr. Spooner) Did you have any understanding or knowledge, and if so, what was it, as to the reason why any interest in these annual payments was taken, or the declaratory statements etc. were made by the company—that is, with regard to whether or not it was on the theory that it was a

valuable thing, or something that they did not want to let go until they found out?

A Before paying the first bill of these expenses that came to me—I was manager of the company and Mr. Elijah Smith was president—my remembrance is that he was here at the time—I referred the bill to him, and there being no information with reference to the section, and the section being unsurveyed government land, no possibility of obtaining any title except by purchase, the question was discussed between us as to whether it was worth while to pay any expenses or to notify Mr. Howard that he would not continue any further with the expenses; and it was requested of me to continue the expense on account of the possibility of information that it might give us with reference to coal in that section of the country, or that particular locality.

215

Q They finally ceased paying even the small amounts that they were paying, didn't they?

A Well, I knew nothing about it. The matter was left practically with Mr. Howard and I knew nothing about it, and no examination was made of it up here, and to tell you the truth, we didn't think anything of it.

Q It was started before you had anything to do with it, wasn't it?

A Yes sir.

Q When you came in the office there you found it there?

A Yes.

Q And your knowledge of it consisted simply of what you picked up as you have described?

A Yes. The toleration of that which already existed.

Q I would like you to state whether or not any information, even the little which you have mentioned here—what if any effect it had on your mind at the time Brooks approached you on the subject of purchasing the property for the Washington Securities Company. Did you know that it was the same section?

A He informed me it was section 34, located near Kanascott and he asked whether I knew about it, and I told him no, and he went on to describe then its location with reference to other mines there beyond Franklin and within the

range of Kangley and Drum and Alta and some other pieces of property that had been more or less exploited in that
216 part of the country, and I told him then that I had an indistinct remembrance that that had been brought to my attention some years before, but that, I had never seen any report or examination of it, I was not aware of the value of it, and I did not know whether it was coal or not, and I did not care to go any further with it, that was as to myself personally. When the company was formed I referred it to them and they desired first an examination. Upon that examination they made their purchase.

Q Was the examination made, based in any way upon what you have stated existed away back in '90 and '91?

A No sir; in fact I did not know there were tunnels on the property.

Q How is that?

A In fact I did not know whether there were any tunnels or open prospects on the property, or that there ever had been.

Q When did you first find that out?

A When the examination was made they took some—the expert took some men with him, and in looking over the ground they uncovered some prospect holes and dug out some tunnel that had been more or less filled with water and debris.

Q I wish you would state whether or not, from the report that you had from the men whom you sent there and from such other knowledge you had, whether or not that property, as coal property, is anything more at the present time than a prospect?

A Well; no, it is a probability. It could not be determined as a mine, and in fact I was loath, even after
217 the report was made, to take hold of it until I had secured some additional information with reference to a rock dyke that runs fairly close to that property up there, and which, in my opinion, is the reason why one of the contiguous pieces of coal property was worthless. The rock dyke having practically coked the coal in the mine, and rendered it entirely worthless.

Q That was a matter that was found out later—what mine was that in?

A That was the Kangley mine.

Q That was a matter that was found out, and could only have been found out after considerable work was done and money expended?

A There was one hundred and fifty thousand dollars and more spent on that property before it was abandoned.

Q I would like to ask you whether or not, from the information you have, it is certain at the present time—whether it is certain that that dyke does or does not extend into this property?

A Well, I satisfied myself thoroughly well that it did not; that is, that it did not reach this property.

Q I understood, from your examination by Mr. Todd, that you stated at the time you and I went up there, that was the first time you had even been on the property?

A Yes sir.

Q That was this fall?

A Yes sir.

Q You saw considerable of the property at that time, didn't you?

A Yes sir.

218 Q I wish you would state to the court, whether or not there is anything about the topography of the section, as you saw it, and the nature of the ground and the growth of timber etc., as you saw it, which would indicate that it is mining property; only fit for mining purposes and unfit for all other purposes?

A No. I could not tell that. There is some very good bottom land there, and there is some pretty fair timber; and the land itself is not such as, from the mere superficial glance at it, you would say was mining land. As to the qualifications between coal and agricultural, it is pretty hard to tell. Section 8, about four miles from there, has five different croppings of coal within twelve or thirteen hundred feet of each other, and those croppings, after having had $40,000 expended upon them, turned out to be what is known as a syncline, which was in the nature of an inverted V—the coal running down a small distance and coming up again, making two croppings on the surface and having practically no body of coal,

although the outer croppings would indicate an enormously valuable piece of coal.

Q I would like to ask you if you know whether the timber on that property has any value?

A Yes. The timber has value. We have had one or two requests to buy the timber. I do not know how much there is, because I never had it cruised.

Q You heard Mr. Colman's testimony, didn't you?

A Yes sir.

Q Do you remember it, calling your attention to his testimony in which he showed the different strikes of the three veins that he mentioned?

219

A Yes.

Q I would like to ask you, from your experience in connection with coal lands and coal mines such as you had, what, if any, conclusion can be drawn as to the extent and character of the veins, from the strikes that he describes there?

A Well, it would indicate a very troubled condition and an abnormal condition. He has a strike on one vein east and west; the next vein he has the strike northwest and the dip of the vein he has running—one 23 degrees and one about 7 degrees and one from 30 to 35 degrees, which would indicate, in all possibility, so far as the seven degree vein is concerned, that it might be a slip that had been carried down, carrying the coal with it, until it more or less flattened out, and that it was not in place, and his other indications are either wrong, or else the coal there is in a troubled condition, because the strike does not come around in any way which would indicate any regular curve, or one that would leave the coal in, what you might call, a regular or fixed condition.

RECROSS EXAMINATION.

Q (Mr. Todd) Is the timber on this land second growth, Mr. Smith?

A Yes, very largely, except the cedar. The cedar is fairly good size.

220

Q Has the fir been logged off?

A I do not see any indications of any logging on the section at all.

Q Well, this may be the first growth of timber then, of a small size?

A Yes. It is rather a peculiar section. I never saw very many like it.

Q Does the timber grow large along the railroad there?

A Well, occasional trees; generally speaking, the trees are small, what you might call poles.

Q You have dealt with other timber in that township, haven't you?

A I think it is in the township above.

Q That is larger timber, farther north?

A Yes.

Q And it is a great deal more valuable than the timber on this section?

A Yes; the timber that is thick is really more valuable, because it takes a less amount of roads to log it.

Q What expert did you have examine this coal land?

A Mr. Hawkins.

Q Did his examination show the same thing as to strikes, that Mr. Colman's examination did?

A No sir.

Q Did he examine the same veins that Mr. Colman did?

A Well, I cannot tell you whether he examined the same veins. I do not bear in mind now the cross section of his veins, but the dip and strike of his veins were not in accordance with Mr. Colman's testimony.

221 Q (Mr. Spooner) Where is Mr. Hawkins?

A I don't know. He is a civil engineer and I am inclined to think he is out doing some work for one of these railroad companies at the present time.

Q In this state or in Alaska?

A In this state. He has been in Alaska but he has just returned lately, and I think he is out now for the Milwaukee Road doing some engineering work.

MR. SPOONER: I will now offer all these photographs that were identified by Mr. Brockway, as exhibits in this case.

Photographs received in evidence without objection and marked respondent's exhibits "1", "2", "3", "4", "5", "6", "7" and "8".

MR. SPOONER: Mr. Todd, it seems to me that it would be a wise thing, from the standpoint of both parties, if we had a decent map or plat of this land. Now, with that exception, our testimony is finished, but I would suggest that we get a map made and we can just simply agree upon that and put it in later.

MR. TODD: What do you want shown on the map?

MR. SPOONER: I want some of the surrounding sections, and this section shown in a proper way. It may be that your map is exactly right, but I would like to have a little larger map and a better one so that it could be used by both of us in arguing the case.

MR. TODD: I do not see any objection to that.

222 MR. SPOONER: Then, we will consider our testimony closed, with the exception that we will try to agree upon some plat and we will put it in.

MR. TODD: All right.

223 December 14, 1909, 10 o'clock a. m.

Continuation of proceedings pursuant to agreement.

C. J. SMITH, recalled on behalf of the defendant, testifies as follows:

Q (by Mr. Spooner) Mr. Smith, what do you know about the height of the hill or mountain known as Sugar Loaf?

A I think it is between four and five hundred feet high.

Q Do you have any information other than your own observation?

A The engineer I sent up there reported it to be something over four hundred feet by barometric reading.

(testimony of witness closed)

WHEREUPON ALL PARTIES REST AND THE TESTIMONY IS CLOSED.

224 UNITED STATES OF AMERICA, :
WESTERN DISTRICT OF WASHINGTON, : SS
NORTHERN DIVISION. :

I, the undersigned, United States Master in Chancery for the United States Circuit Court, Western District of Wash-

ington, Northern Division, do hereby certify: That by stipulation between the parties pursuant to the order of reference made herein, the proofs and testimony of the respective parties to this action were taken before me at my office in the Federal Building, in the City of Seattle and State of Washington, within the said Western District of Washington and Northern Division, beginning on the 14th day of October, 1909, and being adjourned from day to day and time to time thereafter to suit the convenience of the respective parties, their solicitors and witnesses, occupying in all three days in taking the same, and closing on the Fourteenth day of December, 1909; and that the foregoing typewritten transcript, comprising 204 pages, constitutes the whole of the testimony taken in said cause on behalf of plaintiff and defendant; that the papers, books and documents marked respectively as plaintiff's echibits "A" to "J", and defendant's exhibits "1" to "8", all inclusive, were duly offered in evidence before me as such Master in Chancery and are returned and filed herewith as exhibits on behalf of said respective parties, as a part of the proofs and testimony in said cause; that the reading of the depositions to or by the witnesses and the signatures of the various witnesses to the depositions respectively were by said witnesses and by the solicitors for
225 the respective parties to said cause duly and expressly waived, AND

I do hereby certify that the amount of the Master in Chancery fees, including the fees of the stenographers, is $240.50, paid as follows: By plaintiff $174.05, and by defendant $66.45.

All of which is respectively submitted.

ROGER S. GREENE,

United States Master in Chancery, for the Western District of Washington, Northern Division.

Endorsed: Filed U. S. Circuit Court, Western District of Washington, Jan. 28, 1910, A. Reeves Ayres, Clerk, W. D. Covington, Deputy.

COMPLAINANT'S EXHIBIT "A."

Department of the Interior,
General Land Office,
Washington, D. C., June 2, 1908

I hereby certify that the annexed copies pages 1 to 22 inclusive, papers in H. E. No. 18603 C. C. E. No. 20278 Robert L. Barbee Seattle, Wash., land district are true and literal exemplifications from the originals in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

(Seal) JOHN O'CONNELL,
Acting Recorder of the General Land Office.

Application No. 18603

HOMESTEAD.

Land Office at Seattle, Wn., Dec. 31, 1902

I, Robert L. Barbee, of Ravensdale, Wn., do hereby apply to enter, under Section 2289, Revised Statutes of the United States, the SW¼ of Section 34, in Township 22 N. of Range 7 E., containing 160 acres, at 2.50 per acre.

ROBERT L. BARBEE

Land Office at Seattle, Wash., Dec. 31st, 1902

I, J. Henry Smith, Register of the Land Office, do hereby certify that the above application is for Surveyed Lands of the class which the applicant is legally entitled to enter under Section 2289, Revised Statutes of the United States, and that there is no prior valid adverse right to the same.

J. HENRY SMITH, Register.

Receiver's Receipt, No. 18603 Application, No. 18603

Endorsed: No. 18603. Homestead Application. Seattle, Wash. Robert L. Barbee. Dec. 31, 1902. Section 34, Town. 22 N., Range 7 E.

HOMESTEAD.

Receiver's Office, Seattle, Washington,
December 31st, 1902.

Received of Robert L. Barbee of Ravensdale, Wash., the sum of Twenty Two dollars; being the amount of fee and compensation of Register and Receiver for the entry of SW$\frac{1}{4}$ of Section 34 in Township 22 N. of Range 7 East, W. M., under Section No. 2290, Revised Statutes of the United States.

160 acres at $2.50 acre.

$22.00

LYMAN B. ANDREWS, Receiver.

HOMESTEAD AFFIDAVIT.

Department of the Interior,
United States Land Office,

Seattle, Wn., Dec. 31, 1902

I, Robert L. Barbee, of Ravensdale, Wn., having filed my application No. 18603, for an entry under section 2289, Revised Statutes of the United States, do solemnly swear that I am not the proprietor of more than one hundred and sixty acres of land in any State or Territory; that I am a native born citizen of the United States, above the age of twenty-one years, and a married man: that my said application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation, and that I will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that I am not acting as agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that I do not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for myself, and that I have not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation, or syndicate whatsoever, by which the

title which I might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except myself, and further, that since August 30, 1890, I have not entered under the land laws of the United States, or filed upon, a quantity of land, agricultural in character, and not mineral, which, with the tracts now applied for, would make more than three hundred and twenty acres, and that I have not heretofore made any entry under the homestead laws.

ROBERT L. BARBEE

Sworn to and subscribed before me this 31 day of December, 1902, at my office at Seattle in King County, Wn.

J. HENRY SMITH, Register.

NON-MINERAL AFFIDAVIT.

Department of the Interior,
United States Land Office,

Seattle, Wn., Dec. 31, 1902

Robert L. Barbee, being duly sworn according to law, deposes and says that he is the identical person who is an applicant for Government title to the SW¼, Sec. 34, Tp. 22 N., R. 7 E.; that he is well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto; that there is not, to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, or other valuable mineral deposit; that the land contains no salt spring, or deposits of salt in any form sufficient to render it chiefly valuable therefor; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that his application therefor is not made for

the purpose of fraudulently obtaining title to the mineral land, but with the object of securing said land for agricultural purposes; that the said land is not occupied and improved by any Indian, and that his post-office address is Ravensdale, Wn.

ROBERT L. BARBEE

I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant (or has been satisfactorily identified before me by E. C. Eglin), and that I verily believe him to be a credible person and the person he represents himself to be, and that this affidavit was subscribed and sworn to before me at my office in Seattle, Wn., within the Seattle land district, on this 31 day of Dec., 1902.

J. HENRY SMITH, Register.

Receiver's Receipt, No. 18603 Application, No. 18603

HOMESTEAD.

Receiver's Office, Seattle, Washington,
December 31st, 1902.

Received of Robert L. Barbee, of Ravensdale, Wash., the sum of Twenty Two dollars; being the amount of fee and compensation of Register and Receiver for the entry of SW¼ of Section 34, in Township 22 N. of Range 7 East, W. M., under Section No. 2290, Revised Statutes of the United States.

160 acres at $2.50 acre.

$22.00.

LYMAN B. ANDREWS, Receiver.

NOTICE FOR PUBLICATION.

Department of the Interior,
Land Office at Seattle, Wash.,
Feby. 13th, 1904.

Notice is hereby given that the following-named settler has filed notice of his intention to make final proof in support of his claim, and that said proof will be made before Register and Receiver at Seattle, Wash., on March 30th, 1904, viz:

Robert L. Barbee, for the SW¼ Sec. 34, Tp. 22 N., R. 7 E. He names the following witnesses to prove his continuous residence upon and cultivation of said land, viz:

Zachariah Turner, of Palmer, Wash.; John Dickson, of Palmer, Wash.; Peter Brown, of Kanasket, Wash.; Anthony Fitch, of Kanasket, Wash.

J. HENRY SMITH, Register.

AFFIDAVIT OF PUBLICATION.

State of Washington,
County of King.—ss.

Jos. A. McMillan being sworn, says he is the Manager of the Enumclaw Courier a weekly newspaper printed and published at Enumclaw in King County, State of Washington; that it is a newspaper of general circulation in said County and State, and that the annexed notice was published in said newspaper and not in a supplement thereof, and is a true copy of the notice as it was printed and published once in each week in the regular and entire issue of said paper for a period of 5 consecutive weeks, commencing on the 19 day of Feby., 1904, and ending on the 18 day of March, 1904, and that said newspaper was regularly published and distributed to its subscribers during all of said period, and that such notice was published in said paper in each and every issue during said period.

JOS. McMILLAN

Subscribed and sworn to before me this 19 day of March, 1904.

(Seal) W. F. ECKHART,
Notary Public in and for the State of Washington residing in Enumclaw.

NOTICE FOR PUBLICATION.

Land Office at Seattle, Wash.,
February 13, 1904.

Notice is hereby given that the following named settler has filed notice of his intention to make final proof in sup-

port of his claim, and that the said proof will be made before the Register and Receiver at Seattle, Wash., on March 30, 1904, viz: HOBERT L. BARBEE, for the SW¼, Sec. 34, Tp. 22N., R. 7 E.

He names the following witnesses to prove his continuous residence upon and cultivation of said land, viz:

Zachariah Turner and John Dickson of Palmer, Wash., and Peter Brown and Anthony Fetch of Kanaskat, Wash.

J. HENRY SMITH, Register.

HOMESTEAD.

Land Office at Seattle, Wash.,
Feby. 13th, 1904.

I, Robert L. Barbee, of Kanasket, King Co., Wn., who made Homestead Application No. 18603 for the SW¼, Sec. 34, Tp. 22 N., R. 7 E., do hereby give notice of my intention to make final proof to establish my claim to the land above described, and that I expect to prove my residence and cultivation before the Regr. & Recr. at Seattle, Wash., on Mch. 30th, 1904., by two of the following witnesses:

Zachariah Turner, of Palmer, Wash.; John Dickson, of Palmer, Wash.; Peter Brown, of Kanaskat, Wash.; Anthony Fitch, of Kanaskat, Wash.

ROBERT L. BARBEE.

Land Office at Seattle, Wash.,
Feby. 16th, 1904.

Notice of the above application will be published in the Courier, printed at Enumclaw, Wash., which I hereby designate as the newspaper published nearest the land described in said application.

J. HENRY SMITH, Register.

CERTIFICATE AS TO POSTING OF NOTICE.

Department of the Interior,
United States Land Office,

At Seattle, Wash.,
Mar. 30, 1904.

I, J. Henry Smith, Register, do hereby certify that a notice, a printed copy of which is hereto attached, was by me posted in a conspicuous place in my office for a period of thirty days, I having first posted said notice on the 13th day of Feb., 1904.

J. HENRY SMITH, Register.

IN THE UNITED STATES DISTRICT LAND OFFICE, SEATTLE, WASHINGTON.

State of Washington,
County of King.—ss.

ANTHONY FITCH, being first duly sworn, upon his oath deposes and says: That he is the identical person advertised as one of the witnesses in support of the final proof of Robert L. Barbee for the SW¼ of Sec. 34, Tp. 22 N., R. 7 E., W. M.; that there is a mistake in the advertised notice in the spelling of affiant's Sir name; that it is spelt "Fetch" instead of "Fitch", but that this affiant is the identical person intended as a witness in said cause.

ANTHONY FITCH,

Subscribed and sworn to before me this 30th day of March, 1904.

LYMAN B. ANDREWS, Receiver.

UNITED STATES DISTRICT LAND OFFICE, SEATTLE, WASHINGTON.

In re Homestead Entry of
Robert L. Barbee.

State of Washington,
County of King.—ss.

ROBERT L. BARBEE, of the County and State aforesaid, being first duly sworn, upon his oath deposes and says: That

he is the identical person who made Homestead Entry for the SW¼ of Sec. 34, Tp. 22 N., R. 7 E., W. M., and who has advertised to make finel proof for said tract of land on this the 30th day of March, 1904; affiant further states that the Editor who published the notice of final proof for this affiant has made a clerical error in the Christian name of this affiant, inasmuch as said Editor has made it "Hobart L. Barbee" instead of "Robert L. Barbee", changing the "R" in Robert to "H"; that this affiant is the identical person intended as mentioned in said notice, and the identical person who made Homestead Entry for said tract of land.

ROBERT L, BARBEE,

Subscribed and sworn to before me this 30th day of March, 1904.

LYMAN B. ANDREWS, Receiver.

AFFIDAVIT REQUIRED OF CLAIMANT.

I, Robert L. Barbee, claiming the right to commute, under Section 2301 of the Revised Statutes of the United States, my homestead entry No. 18603, made upon the SW¼ section 34, township 22 N. range 7 E., do solemly swear that I made settlement upon said land in November, 1901, and that since such date, to-wit. on the 15th day of May, 1903, I have built a house on said land, and have continued to reside therein up to the present time; that I have broken and cultivated 1½ acres of said land, and that no part of said land has been alienated, except as provided in Section 2288 of the Revised Statutes, but that I am the sole *bona fide* owner as an actual settler.

I further swear that I have not heretofore perfected or abandoned an entry made under the homestead laws of the United States.

ROBERT L. BARBEE.

Subscribed and sworn to before me this 30th day of March, 1904, at my office at Seattle, in King County, Washington.

LYMAN B. ANDREWS, Receiver.

NON-MINERAL AFFIDAVIT.

Department of the Interior,
United States Land Office,

Seattle, Washington,
March 30, 1904.

Robert L. Barbee, being duly sworn according to law, deposes and says that he is the identical person who is an applicant for Government title to the SW¼ Sec. 34, Tsp. 22 N., R. 7 E.; that he is well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto; that there is not, to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, or other valuable mineral deposit; that the land contains no salt spring, or deposits of salt in any form sufficient to render it chiefly valuable therefor; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that his application therefor is not made for the purpose of fraudulently obtaining title to the mineral land, but with the object of securing said land for agricultural purposes, and that his post-office address is Kanaskat, Wash.

ROBERT L. BARBEE.

I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known, and that I verily believe him to be a credible person and the person he represents himself to be, and that this affidavit was subscribed and sworn to before me at my office in Seattle, Washington, within the Seattle, Washington, land district, on this 30th day of March, 1904.

LYMAN B. ANDREWS, Receiver.

HOMESTEAD PROOF—TESTIMONY OF WITNESS.

Anthony Fitch, being called as witness in support of the Homestead entry of Robert L. Barbee for SW¼ Sec. 34, Tsp. 22 N., R. 7 E., testifies as follows:

Ques. 1.—What is your name, age, and post-office address?

Ans.—Anothy Fitch, 43 years, Kanaskat, Wash.

Ques 2.—Are you well acquainted with the claimant in this case and the land embraced in his claim?

Ans.—I am.

Ques. 3.—Is said tract within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or business?

Ans.—No.

Ques. 4.—State specifically the character of this land—whether it is timber, prairie, grazing, farming, coal, or mineral land.

Ans.—Agricultural land.

Ques. 5.—When did claimant settle upon the homestead, and at what date did he establish actual residence thereon?

Ans.—Claimant settled prior to May, 1903. I do not know the date and cannot be more exact. He established his residence in May, 1903. I hauled in his provisions and material for a house at that time.

Ques. 6.—Have claimant and family resided continuously on the homestead since first establishing residence thereon? (If settler is unmarried, state the fact.)

Ans.—Claimant is married having three children and wife. Claimant and family have resided continuously on the land since establishing residence.

Ques. 7.—For what period or periods has the settler been absent from the land since making settlement, and for what purpose; and if temporarily absent, did claimant's family reside upon and cultivate the land during such absence?

Ans.—Not more than a week, to my knowledge, since settlement in periods of a day or two.

Ques. 8.—How much of the homestead has the settler cultivated, and for how many seasons did he raise crops thereon?

Ans.—About 4 acres cultivated and has raised one crop.

Ques. 9.—What improvements are on the land, and what is their value?

Ans.—A story and a half house of four rooms, shed, barn, chicken coop, out house, 4 acres cultivated, Total value $800.00.

Ques. 10.—Are there any indications of coal, salines, or minerals of any kind on the homestead? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans.—None to my knowledge.

Ques. 11.—Has the claimant mortgaged, sold, or contracted to sell, any portion of said homestead?

Ans.—No.

Ques. 12.—Are you interested in this claim; and do you think the settler has acted in entire good faith in perfecting this entry?

Ans.—I am not. I think that he is.

ANTHONY FITCH.

I HEREBY CERTIFY that the foregoing testimony was read to the witness before being subscribed and was sworn to before me this 30th day of March, 1904, at my office at Seattle, in King County, Wash.

LYMAN B. ANDREWS, Receiver.

HOMESTEAD PROOF—TESTIMONY OF WITNESS.

John Dickson, being called as witness in support of the Homestead entry of Robert L. Barbee for SW¼ Sec. 34, Tsp. 22 N., R. 7 E., testifies as follows:

Ques. 1.—What is your name, age, and post-office address?

Ans.—John Dickson, 82 years, Palmer, Wash.

Ques. 2.—Are you well acquainted with the claimant in this case and the land embraced in his claim?

Ans.—I am.

Ques. 3.—Is said tract within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or business?

Ans.—No.

Ques. 4.—State specifically the character of this land—

whether it is timber, prairie, grazing, farming, coal, or mineral land.

Ans.—Farming land.

Ques. 5.—When did claimant settle upon the homestead, and at what date did he establish actual residence thereon?

Ans.—Claimant settled and established residence over fifteen months ago.

Ques. 6.—Have claimant and family resided continuously on the homestead since first establishing residence thereon? (If settler is unmarried, state the fact.)

Ans.—Claimant and his family have resided on the land continuously.

Ques. 7.—For what period or periods has the settler been absent from the land since making settlement, and for what purpose; and if temporarily absent, did claimant's family reside upon and cultivate the land during such absence?

Ans.—Not more than a day or two in a month, when he would have work a short distance from the land.

Ques. 8.—How much of the homestead has the settler cultivated, and for how many seasons did he raise crops thereon?

Ans.—About 1½ acres and has raised crops one season.

Ques. 9.—What improvements are on the land, and what is their value?

Ans.—A story and half house, barn, shed, chicken house, 1½ acres cultivated. Total value: $1,000.00.

Ques. 10.—Are there any indications of coal, salines, or minerals of any kind on the homestead? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans.—None.

Ques. 11.—Has the claimant mortgaged, sold, or contracted to sell, any portion of said homestead?

Ans.—No.

Ques. 12.—Are you interested in this claim; and do you think the settler has acted in entire good faith in perfecting this entry?

Ans.—I am not. I think that he is acting in good faith.

JOHN DICKSON.

I HEREBY CERTIFY that the foregoing testimony was read to the witness before being subscribed and was sworn to before me this 30th day of March, 1904, at my office at Seattle, in King County, Wash.

LYMAN B. ANDREWS, Receiver.

HOMESTEAD PROOF—TESTIMONY OF CLAIMANT.

Robert L. Barbee, being called as a witness in his own behalf in support of homestead entry, No. 18603, for final comm. Proof, testifies as follows:

Ques. 1.—What is you name, age, and post-office address?

Ans.—Robert L. Barbee, 37 years, Kanaskat, Wash.

Ques. 2.—Are you a *native-born* citizen of the United States, and if so, in what State or Territory were you born?

Ans.—I am. Born in Missouri.

Ques. 3.—Are you the identical person who made homestead entry, No. 18603, at the Seattle, Wash., land office on the 31st day of December, 1902, and what is the true description of the land now claimed by you?

Ans.—I am. SW ¼ Sec. 34, Tsp. 22 N., R. 7 E.

Ques. 4.—When was your house built on the land and when did you establish actual residence therein? (Describe said house and other improvements which you have placed on the land, giving total value thereof.)

Ans.—I built my first house in March, 1901, and took up residence at that time. The second house I built in May, 1903.

Ques. 5.—Of whom does your family consist; and have you and your family resided continuously on the land since first establishing residence thereon? (If unmarried, state the fact.)

Ans.—I am married, family consist of wife and three children. I have resided continuously on land since establishing residence.

Ques. 6.—For what period or periods have you been absent from the homestead since making settlement, and for what purpose; and if temporarily absent, did your family reside upon and cultivate the land during such absence?

Ans.—For the last fifteen months I have not been absent a day. Prior to that I have not been absent more than a week

or so in every two months, during which time my family would remain on the land.

Ques. 7.—How much of the land have you cultivated each season, and for how many seasons have you raised crops thereon?

Ans.—About 1½ acres cultivated and have raised two crops.

Ques. 8.—Is your present claim within the limits of an incorporated town or selected site of a city or town, or used in any way for trade and business?

Ans.—No.

Ques. 9.—What is the character of the land? Is it timber, mountainous, prairie, grazing, or ordinary agricultural land? State its kind and quality, and for what purpose it is most valuable.

Ans.—Timbered farming land.

Ques. 10.—Are there any indications of coal, salines, or minerals of any kind on the land? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans.—None to my knowledge.

Ques. 11.—Have you ever made any other homestead entry? (If so, describe the same.)

Ans.—I have not.

Ques. 12.—Have you sold, conveyed, or mortgaged any portion of the land; and if so, to whom and for what purpose?

Ans.—No.

Ques. 13.—Have you any personal property of any kind elsewhere than on this claim? (If so, describe the same, and state where the same is kept.)

Ans.—I have not.

Ques. 14.—Describe by legal subdivisions, or by number, kind of entry, and office where made, any other entry or filing (not mineral), made by you since August 30, 1890.

Ans.—I have made none.

ROBERT L. BARBEE.

I HEREBY CERTIFY that the foregoing testimony was read to the claimant before being subscribed, and was sworn

to before me this 30th day of March, 1904, at my office at Seattle, in King County, Wash.

LYMAN B. ANDREWS, Receiver.

FINAL AFFIDAVIT REQUIRED OF HOMESTEAD CLAIMANTS.

Section 2301 of the Revised Statutes of the United States.

I, Robert L. Barbee, having made a Homestead entry of the SW¼ Section No. 34, in Township No. 22 N. of Range No. 7 E., subject to entry at Seattle, Wash., under section No. 2289 of the Revised Statutes of the United States, do now apply to perfect my claim thereto by virtue of section No. 2301 of the Revised Statutes of the United States; and for that purpose do solemnly swear that I am a native born citizen of the United States; that I have made actual settlement upon and have cultivated and resided upon said land since November, 1901, to the present time; that no part of said land has been alienated, except as provided in section 2288 of the Revised Statutes, but that I am the sole *bona fide* owner as an actual settler; that I will bear true allegiance to the Government of the United States; and, further, that I have not heretofore perfected or abandoned an entry made under the homestead laws of the United States.

ROBERT L. BARBEE.

I, L. B. Andrews, Receiver of U. S. Land Office, do hereby certify that the above affidavit was subscribed and sworn to before me this 30th day of March, 1904, at my office at Seattle, in King County, Wash.

LYMAN B. ANDREWS, Receiver.

Indorsed. Homestead Proof. Approved: J. Henry Smith, Register. Lyman B. Andrews, Receiver.
No. 20278.

Receiver's Office at Seattle, Washington,
March 30, 1904.

Received from Robert L. Barbee, of Kanaskat, of King County, Washington, the sum of four hundred dollars; being

in full for the SW¼ of Section No. 34, in Township No. 22 N., of Range No. 7 E., containing 160 acres, at $2.50 per acre. $400.00.

LYMAN B. ANDREWS, Receiver.

Com. H'd. No. 18603.

$1.50 testimony fee received. Number of written words, 665. Rate per 100 words 22½ cents.
No. 20278.

Land Office at Seattle, Washington,
March 30, 1904.

IT IS HEREBY CERTIFIED that, in pursuance of law, Robert L. Barbee, residing at Kanaskat, in King County, State of Washington, on this day purchased of the Register of this Office the SW¼ of Section No. 34, in Township No. 22 N., of Range No. 7 E. of the W. Principal Meridian, Wash., containing 160 acres, at the rate of two dollars and fifty cents per acre, amounting to four hundred dollars, for which the said Robert L. Barbee has made payment in full as required by law.

NOW, THEREFORE, BE IT KNOWN that, on presentation of this certificate to the COMMISSIONER OF THE GENERAL LAND OFFICE, the said Robert L. Barbee shall be entitled to receive a Patent for the lot above described.

J. HENRY SMITH, Register.

Endorsed: Complainant's Exhibit A. Cause No. 1706. U. S. Circ. Ct. Western Dist. of Wash., Northern Division. Filed Oct. 14, 1909. Roger S. Greene, Master.

Filed U. S. Circuit Court Western District of Washington, Jan. 28, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

COMPLAINANT'S EXHIBIT "B."

Department of the Interior,
General Land Office,
Washington, D. C., June 2, 1908.

I hereby certify that the annexed copies pages 1 to 27 inclusive, papers in H. E. No. 17996 C. C. E. No. 20103 of

Thomas B. Forsyth, Seattle, Wash., land district, and all related papers are true and literal exemplifications from the originals in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

(Seal) JOHN O'CONNELL,
Acting Recorder of the General Land Office.

Application No. 17996.

HOMESTEAD.

Land Office at Seattle, Wash., June 20th, 1901.

I, Thomas B. Forsyth, of South Prairie, Price Co., Wash., do hereby apply to enter, under Section 2289, Revised Statutes of the United States, the W½ NE¼ & W½ SE¼ of Section 34, in Township 22 N. of Range 7 E, containing 160 acres.

THOMAS B. FORSYTH

Land Office at Seattle, Wash., June 20th, 1901

I, Edward P. Tremper, Register of the Land Office, do hereby certify that the above application is for Surveyed Lands of the class which the applicant is legally entitled to enter under Section 2289, Revised Statutes of the United States, and that there is no prior valid adverse right to the same.

EDWARD P. TREMPER, Register.

Receiver's Receipt, No. 17996 Application, No. 17996

HOMESTEAD.

Receiver's Office, Seattle, Washington, June 20th, 1901

Received of Thomas B. Forsyth, So. Prairie, Wn., the sum of Twenty-two dollars; being the amount of fee and compensation of Register and Receiver for the entry of W½ NE¼ and W½ SE¼ of Section 34 in Township 22 N. of Range 7 E, under Section No. 2290, Revised Statutes of the United States.

160.00 acres at 2.50.

$22.00

COLUMBUS T. TYLER, Receiver.

HOMESTEAD AFFIDAVIT.

Department of the Interior,
United States Land Office,

Seattle, Wash., June 20th, 1901

I, Thomas B. Forsyth, of South Prairie, Wash., having filed my application No. 17996, for an entry under section 2289, Revised Statutes of the United States, do solemnly swear that I am not the proprietor of more than one hundred and sixty acres of land in any State or Territory; that I have declared my intention to become a citizen of the United States, over 21 years of age & the head of a family. That his declaration of intention filed herewith states his names as Thomas Forsyth, and that he is the same person who made said declaration, that my said application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation, and that I will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that I am not acting as agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that I do not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for myself, and that I have not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation, or syndicate whatsoever, by which the title which I might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except myself, and further, that since August 30, 1890, I have not entered under the land laws of the United States, or filed upon, a quantity of land, agricultural in character, and not mineral, which, with the tracts now applied for, would make more than three hundred and twenty acres, except............. and that I have not heretofore made any entry under the homestead laws, except for Lots 3, 5, SE¼ NW¼ & NW¼ SE¼ Sec. 13, Tp. 34 N., R. 9 E., dated Aug. 7, 1889, No. 12004, at

Seattle Land Office and relinquished voluntarily May 10, 1892, for reason wife could not live on said land & I derived no benefit whatever from my said entry or relinquishment.

THOMAS B. FORSYTH

Sworn to and subscribed before me this 20th day of June, 1901, at my office at Seattle in King County, Wash.

COLUMBUS T. TYLER, Receiver.

NON-MINERAL AFFIDAVIT.

United States Land Office,

Seattle, Wash., June 20, 1901

Thomas B. Forsyth, being duly sworn according to law, deposes and says that he is the identical Thomas B. Forsyth who is an applicant for Government title to the W½ NE¼, W½ SE¼ of Sec. 34, Tp. 22 N., R. 7 E., that he is well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto; that there is not, to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, or other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that his application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes, and that his post-office address is South Prairie, Price Co., Wash.

THOMAS B. FORSYTH

I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfac-

torily identified before me by J. Y. Ostrander), and that I verily believe him to be a credible person and the person he represents himself to be, and that this affidavit was subscribed and sworn to before me at my office in Seattle, Wash., within the Seattle land district, on this 20th day of June, 1901.

COLUMBUS T. TYLER, Receiver.

UNITED STATES OF AMERICA.

Territory of Washington,
Third Judicial District.—ss

I, Thomas Forsyth, do declare on oath that it is *bona fide* my intention to become a citizen of the United States of America; that I will support the Constitution and Government of the United States of America, the Organic Act and Laws of Washington Territory, and renounce forever all allegiance and fidelity to all and every foreign Prince, Potentate, State and Sovereignty whatsoever, and particularly to Victoria Queen of Great Britain & Ireland, whose subject I am; so held me God.

THOMAS FORSYTH

Subscribed and sworn to before me this 25th day of July A. D., 1889.

R. M. HOPKINS, Clerk.

Territory of Washington,
County of King.—ss

I, R. M. Hopkins, Clerk of the District Court, Third Judicial District of Washington Territory, holding terms at Seattle, do hereby certify that I have compared the foregoing copy with the original Declaration of Intention of Thomas Forsyth to become a Citizen of the United States now of record in my office, and that the same is a true and perfect transcript of said original and of the whole thereof.

Witness my hand and the seal of said District Court this 25th day of July, 1889.

(Seal) R. M. HOPKINS, Clerk.

No. 1.—HOMESTEAD.

Land Office at Seattle, Wash., October 8th, 1903

I, Thomas B. Forsythe, of Palmer, Wash., who made Homestead Application No. 17996 for the W½—E½, Sec. 34, Tp. 22 N., R. 7 E., do hereby give notice of my intention to make final proof to establish my claim to the land above described, and that I expect to prove my residence and cultivation before Register & Receiver at Seattle, Wash. on Wed. Nov. 25th, 1903 by two of the following witnesses:

Zachariah Turner, of Palmer; Samuel Ritchie, of Palmer; John Gevin, of Palmer, Wash.; John Dixon, of Palmer, Wash.

THOMAS B. FORSYTH

Land Office at Seattle, Wash., Oct. 9th, 1903

Notice of the above application will be published in the Courier printed at Enumclaw, Wash., which I hereby designate as the newspaper published nearest the land described in said application.

J. HENRY SMITH, Register.

NOTICE FOR PUBLICATION.

Department of the Interior,
Land Office at Seattle, Wash., Oct. 9th, 1903.

Notice is hereby given that the following-named settler has filed notice of his intention to make final proof in support of his claim, and that said proof will be made before Register & Receiver at Seattle, Wash., on Wed. Nov. 25th, 1903, viz: Thomas B. Forsythe, for the W½ of E½, Sec. 34, Tp. 22 N., R. 7 E.

He names the following witnesses to prove his continuous residence upon and cultivation of said land, viz:

Zachariah Turner, Samuel Ritche, John Gerin, John Dixon, all of Palmer, Wash.

J. HENRY SMITH, Register.

AFFIDAVIT OF PUBLICATION.

State of Washington,
County of King.—ss

D. C. Ashum being sworn, says he is the Editor of the Enumclaw Courier, a weekly newspaper printed and published at Enumclaw in King County, State of Washington; that it is a newspaper of general circulation in said County and State, and that the annexed notice of publication was published in said newspaper, and not in a supplement thereof, and is a true copy of the notice as it was printed and published once in each week in the regular and entire issue of said paper for a period of Six consecutive weeks, commencing on the 10 day of October, 1903, and ending on the 14 day of November, 1903, and that said newspaper was regularly published and distributed to its subscribers during all of said period, and that such notice was published in said paper in each and every issue during said period.

D. C. ASHUM.

Subscribed and sworn to before me this 25 day of Nov. 1903

(Seal) W. F. ECKHART
Notary Public in and for the State of Washington, residing in Enumclaw.

NOTICE FOR PUBLICATION.

Land Office at Seattle, Wash., Oct. 9, 1903.

Notice is hereby given that the following named settler has filed notice of his intention to make final proof in support of his claim, and that said proof will be made before the Register and Receiver, at Seattle, Wash., on Wednesday Nov. 25, 1903: Thomas B. Forsythe, for the W½ of E½ Sec. 34, Tp. 22 N., R. 7 E.

He names the following witnesses to prove his continuous residence upon and cultivation of said land, viz: Zachariah Turner, Samuel Ritchie, John Gerin and John Dixon, all of Palmer, Wash.

J. HENRY SMITH, Register.

CERTIFICATE AS TO POSTING NOTICE.

Department of the Interior,
United States Land Office,

At Seattle, Washington, November 25th, 1903.

I, J. Henry Smith, Register, do hereby certify that a notice, a printed copy of which is hereto attached, was by me posted in a conspicuous place in my office for a period of thirty days, I having first posted said notice on the 8th day of October, 1903.

J. HENRY SMITH, Register.

AFFIDAVIT REQUIRED OF CLAIMANT.

I, Thomas B. Forsythe, claiming the right to commute, under Section 2301 of the Revised Statutes of the United States, my homestead entry No. 17996, made upon the W½ of E½ section 34, township 22 N. range 7 East, W. M., do solemnly swear that I made settlement upon said land on the 20th day of June, 1901, and that since such date, to-wit, on the 20th day of June, 1901, I have built a house on said land, and have continued to reside therein up to the present time; that I have broken and cultivated 4½ acres of said land, and that no part of said land has been alienated, except as provided in Section 2288 of the Revised Statutes, but that I am the sole *bona fide* owner as an actual settler.

I further swear that I have not heretofore perfected or abandoned an entry made under the homestead laws of the United States.

THOMAS B. FORSYTH

Subscribed and sworn to before me this 25th day of November, 1903, at my office at Seattle, in King County, Washington.

LYMAN B. ANDREWS, Receiver.

U. S. Land Office, Seattle, Wash.

State of Washington,
County of King

Thomas B. Forsyth of the County and State aforesaid, being first duly sworn, deposes and says that he is the identical per-

son who made Hd. Entry No. 17996, for the West half of the East half of Section thirty-four, Tp. 22 N., R. 7 E.

That the Receiver's Receipt No. 17996 issued to affiant for said entry, has been destroyed by fire and this affiant can not produce the same, and affiant asks that this affidavit & statement be taken in lieu of said receipt.

THOMAS B. FORSYTH

Subscribed and sworn to before me this 25th day of November, 1903.

LYMAN B. ANDREWS, Receiver.

NON-MINERAL AFFIDAVIT.

Department of the Interior,
United States Land Office,
Seattle, Washington, November 25th, 1903

Thomas B. Forsyth, being duly sworn according to law, deposes and says that he is the identical person who is an applicant for Government title to the W½ of E½ of Sec. 34, Tsp. 22 N., R. 7 East, W. M., in King County, Washington; that he is well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto; that there is not, to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, or other valuable mineral deposit; that the land contains no salt spring, or deposits of salt in any form sufficient to render it chiefly valuable therefor; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that his application therefor is not made for the purpose of fraudulently obtaining title to the mineral land, but with the object of securing said land for

agricultural purposes, and that his post-office address is Palmer, King County, Washington.

THOMAS B. FORSYTH

I hereby certify that the foreging affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified before me by F. F. Randolph), and that I verily believe him to be a credible person and the person he represents himself to be, and that this affidavit was subscribed and sworn to before me at my office in Seattle, within the Seattle, Wash. land district, on this 25th day of November, 1903.

LYMAN B. ANDREWS, Receiver.

Auditor's Office No. 37040
King County Washington

Seattle, 12/18, 1903

To Thomas B. Forsyth
At Palmer, Wn.

Herewith Instrument No. 281978 duly recorded.

Yours truly

GEO. B. LAMPING,
O., Deputy County Auditor.

HOMESTEAD PROOF—TESTIMONY OF WITNESS.

Samuel Ritchie, being called as witness in support of the Homestead entry of Thomas B. Forsyth for W½ of E½ of Sec. 34, Tsp. 22, R. 7 East, testifies as follows:

Ques. 1—What is your name, age, and post-office address?

Ans.—Samuel Ritchie: age 46 years: post-office at Palmer, Wash.

Ques. 2.—Are you well acquainted with the claimant in this case and the land embraced in his claim?

Ans.—I am.

Ques. 3.—Is said tract within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or business?

Ans.—It is not.

Ques. 4.—State specifically the character of this land—whether it is timber, prairie, grazing, farming, coal, or mineral land.

Ans.—Timber farming land, such land when cleared of its timber is fit for farming and agricultural purposes.

Ques. 5.—When did claimant settle upon the homestead, and at what date did he establish actual residence thereon?

Ans.—He settled there about the month of June, 1901, and after he completed a house he commenced to reside there with his family at that date.

Ques. 6.—Have claimant and family resided continuously on the homestead since first establishing residence thereon? (If settler is unmarried, state the fact.)

Ans.—Since the date he settled on this land and up to the present time he has had a continuous residence on this land.

Ques. 7.—For what period or periods has the settler been absent from the land since making settlement, and for what purpose; and if temporarily absent, did claimant's family reside upon and cultivate the land during such absence?

Ans.—He has not been absent except while away attending to matters of business and getting provisions.

Ques. 8.—How much of the homestead has the settler cultivated, and for how many seasons did he raise crops thereon?

Ans.—He has about 3 acres of land in cultivation and has raised crops two seasons.

Ques. 9.—What improvements are on the land, and what is their value?

Ans.—He has a house of two rooms, frame and logs, comfortable house: wood shed: fencing: orchard of about 15 fruit trees and small fruits: 3 acres cleared and about 1½ acres slashed: value about $500.00.

Ques. 10.—Are there any indications of coal, salines, or minerals of any kind on the homestead? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans.—Not to my knowledge.

Ques. 11.—Has the claimant mortgaged, sold, or contracted to sell, any portion of said homestead?

Ans.—Not to my knowledge.

Ques. 12.—Are you interested in this claim; and do you think the settler has acted in entire good faith in perfecting this entry?

Ans.—I am not. I am satisfied that the entryman is acting in good faith with the Government in completing title to this land.

SAMUEL RITCHIE

I hereby certify that the foregoing testimony was read to the witness before being subscribed and was sworn to before me this 25th day of November, 1903, at my office at Seattle in King County, Wash.

LYMAN B. ANDREWS, Receiver.

HOMESTEAD PROOF—TESTIMONY OF WITNESS.

John Dixon, being called as witness in support of the Homestead entry of Thomas B. Forsyth for W½ of E½ of Sec. 34, T. 22 N., R. 7 E, testifies as follows:

Ques. 1.—What is your name, age, and post-office address?

Ans.—John Dixon: age 81 years: post-office at Palmer, Wash.

Ques. 2.—Are you well acquainted with the claimant in this case and the land embraced in his claim?

Ans.—I am.

Ques. 3.—Is said tract within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or business?

Ans.—It is not.

Ques. 4.—State specifically the character of this land—whether it is timber, prairie, grazing, farming, coal, or mineral land.

Ans.—Timbered farming land, such land when cleared of its timber is fit for farming and agricultural purposes.

Ques. 5.—When did claimant settle upon the homestead, and at what date did he establish actual residence thereon?

Ans.—Soon after filing during the month of June, 1901, he

completed his house and begun to reside there at that time with his family.

Ques. 6.—Have claimant and family resided continuously on the homestead since first establishing residence thereon? (If settler is unmarried, state the fact.)

Ans.—To the best of my knowledge and belief he has had practically a continuous residence on this land: he has had no other home than the one he maintains on the land.

Ques. 7.—For what period or periods has the settler been absent from the land since making settlement, and for what purpose; and if temporarily absent, did claimant's family reside upon and cultivate the land during such absence?

Ans.—To the best of my knowledge he has only been absent while out attending to matters of business and procuring provisions: I live within a short distance of the land and would know if there was anything to the contrary.

Ques. 8.—How much of the homestead has the settler cultivated, and for how many seasons did he raise crops thereon?

Ans.—He has about 2 to 2 ½ acres of land in cultivation and has raised crops during the past three seasons.

Ques. 9.—What improvements are on the land, and what is their value?

Ans.—He has a house of two rooms, frame and logs, comfortable house: wood shed: orchard of about 15 to 20 fruit trees: small fruits: trails and roads: fencing: about 2½ acres cleared and 2½ acres slashed and partly burned off. Value of improvements about $500.00.

Ques. 10.—Are there any indications of coal, salines, or minerals of any kind on the homestead? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans.—Not to my knowledge.

Ques. 11.—Has the claimant mortgaged, sold, or contracted to sell, any portion of said homestead?

Ans.—Not to my knowledge.

Ques. 12.—Are you interested in this claim; and do you think the settler has acted in entire good faith in perfecting this entry?

Ans.—I am. I am satisfied that he is acting in good faith in completing his proof for this land.

JOHN DICKSON

I hereby certify that the foregoing testimony was read to the witness before being subscribed and was sworn to before me this 25th day of November, 1903, at my office at Seattle in King County, Wash.

LYMAN B. ANDREWS, Receiver.

HOMESTEAD PROOF—TESTIMONY OF CLAIMANT.

Thomas B. Forsyth, being called as a witness in his own behalf in support of homestead entry, No. 17996, for W½ of E½ of Sec. 34, Tsp. 22 N., R. 7 East W. M., testifies as follows:

Ques. 1.—What is your name, age, and post-office address?

Ans.—Thomas B. Forsyth: age 58 years: post-office at Palmer, King County, Washington.

Ques. 2.—Are you a *native-born* citizen of the United States, and if so, in what State or Territory were you born?*

Ans.—I am a naturalized citizen of the United States and at the date I filed on this land on June 20th, 1901, I furnished evidence of having declared my intention.

Ques. 3.—Are you the identical person who made homestead entry, No. 17996, at the Seattle land office on the 20th day of June, 1901, and what is the true description of the land now claimed by you?

Ans.—I am: W½ of E½ of Sec. 34, Tsp. 22 N., R. 7 East, W. M., in King County, Washington.

Ques. 4.—When was your house built on the land and when did you establish actual residence therein? (Describe said house and other improvements which you have placed on the land, giving total value thereof.)

Ans.—Immediately after filing on this land on the 20th day of June, 1901, I completed a house and commenced at that time to make my home on this tract of land. Statement of improvements: I have a house 17x15 feet, frame and logs, two rooms: wood shed: well of water: orchard of 14 fruit trees and small fruits: 300 feet of fencing besides the brush fencing: 400

feet of road: 3 acres of land cleared and about 1½ acres of land slashed: value of the improvements about $500.00.

Ques. 5.—Of whom does your family consist; and have you and your family resided continuously on the land since first establishing residence thereon? (If unmarried, state the fact.)

Ans.—I am: wife and three children: After I completed my house I commenced to reside on the land with my family and have had a continuous residence on the land since that date.

Ques. 6.—For what period or periods have you been absent from the homestead since making settlement, and for what purpose; and if temporarily absent, did your family reside upon and cultivate the land during such absence?

Ans.—Since I settled on the land my wife has had to be absent about 6 months of the time on account of sickness: I resided on the land all the time myself, being only absent while out getting provisions.

Ques.7.—How much of the land have you cultivated each season, and for how many seasons have you raised crops thereon?

Ans.—I have about 3 acres of land in cultivation and have raised crops three seasons.

Ques. 8.—Is your present claim within the limits of an incorporated town or selected site of a city or town, or used in any way for trade and business?

Ans.—It is not.

Ques. 9.—What is the character of the land? Is it timber, mountainous, prairie, grazing, or ordinary agricultural land? State its kind and quality, and for what purpose it is most valuable.

Ans.—The land is timbered farming land, such land when the timber is removed is fit for farming and agricultural purposes.

Ques. 10.—Are there any indications of coal, salines, or minerals of any kind on the land? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans.—Not to my knowledge. I have made an effort to determine as to the minerals and coal and have found none.

Ques. 11.—Have you ever made any other homestead entry? (If so, describe the same.)

Ans.—I have: I made homestead entry entry No. 12004, August 7, 1889, for the Lots 3 and 5, SE$\frac{1}{4}$ of NW$\frac{1}{4}$ and NW$\frac{1}{4}$ of SE$\frac{1}{4}$, Sec. 13, T. 34 N., R. 9 E.

Ques. 12.—Have you sold, conveyed, or mortgaged any portion of the land; and if so, to whom and for what purpose?

Ans.—I have not.

Ques. 13.—Have you any personal property of any kind elsewhere than on this claim? (If so, describe the same, and state where the same is kept.)

Ans.—I have not.

Ques. 14.—Describe by legal subdivisions, or by number, kind of entry, and office where made, any other entry or filing (not mineral), made by you since August 30, 1890.

Ans.—I have made no other entry since the year 1890: By reason of sickness in my family I was forced to give up the land I have above mentioned which tract cost me about $600.00, and for which relinquishment or loss I never received any benefit from. THOMAS B. FORSYTH

STATEMENT OF IMPROVEMENTS

Statement of Improvements: I have a house 17x15 feet, frame and logs, two rooms; wood shed; well of water; orchard of 14 fruit trees and small fruits; 300 feet of fencing besides the brush fencing; 400 feet of road; 3 acres of land cleared and about 1$\frac{1}{2}$ acres of land slashed; value of the improvements about $500.00.

I hereby certify that the foregoing testimony was read to the claimant before being subscribed, and was sworn to before me this 25th day of November, 1903, at my office at Seattle in King County, Wash.

LYMAN B. ANDREWS, Receiver.

FINAL AFFIDAVIT REQUIRED OF HOMESTEAD CLAIMANTS.

Section 2301 of the Revised Statutes of the United States.

I, Thomas B. Forsyth, having made a Homestead entry of the W$\frac{1}{2}$ of E$\frac{1}{2}$ Section No. 34 in Township No. 22 N. of Range

No. 7 East, subject to entry at U. S. Land Office at Seattle, under section No. 2289 of the Revised Statutes of the United States, do now apply to perfect my claim thereto by virtue of section No. 2301 of the Revised Statutes of the United States; and for that purpose do solemnly swear that I am naturalized a citizen of the United States; that I have made actual settlement upon and have cultivated and resided upon said land since the 20th day of June, 1901, to the present time; that no part of said land has been alienated, except as provided in section 2288 of the Revised Statutes, but that I am the sole *bona fide* owner as an actual settler; that I will bear true allegiance to the Government of the United States; and, further, that I have not heretofore perfected or abandoned an entry made under the homestead laws of the United States.

THOMAS B. FORSYTH

I, L. B. Andrews, Receiver, of U. S. Land Office at Seattle, Wash., do hereby certify that the above affidavit was subscribed and sworn to before me this 25th day of November, 1903, at my office at Seattle in King County, Washington.

LYMAN B. ANDREWS, Receiver.

Endorsed: T. B. Forsyth. Homestead Proof. Commuted. Land Office at Seattle, Washington. Orignal Application No. 17996. Approved: J. Henry Smith, Register; Lyman B. Andrews, Receiver.

Proof submitted on November 25, 1903, and suspended by reason of the failure of the Publisher to furnish an affidavit of publication: money tendered: affidavit furnished to complete on this 27th day of Nov., 1903, and final papers issued.

LYMAN B. ANDREWS, Receiver.

No. 20103

Receiver's Office at Seattle, Washington,
November 27th, 1903.

Received from Thomas B. Forsyth of Palmer, of King County, Washington, the sum of Four hundred dollars; being in full for the W ½ of E½ of Section No. 34, in Township No. 22 N., of Range No. 7 East, W. M., containing 160 acres, at $2.50 per acre. Commuted homestead entry No. 17996.

$400.00

LYMAN B. ANDREWS, Receiver.

$1.50 testimony fee received. Number of written words, 665. Rate per 100 words 22½ cents.

No. 20103

Receiver's Office at Seattle, Washington,
November 27th, 1903.

Received from Thomas B. Forsyth of Palmer, of King County, Washington, the sum of Four hundred dollars; being in full for the W ½ of E½ of Section No. 34, in Township No. 22 N., of Range No. 7 East, W. M., containing 160 acres, at $2.50 per acre. Commuted homestead entry No. 17996.
$400.00

LYMAN B. ANDREWS, Receiver.

$1.50 testimony fee received. Number of written words, 665. Rate per 100 words 22½ cents.

281978

Endorsed: Filed July 11-04. Copp & Luckett, City.

Filed for record at request of Grantee, Dec. 9, 1903, at 12 min. past 10 A. M. and recorded in Vol. 5 of Patents page 489 Records of King County, Wash. Geo. B. Lamping, County Auditor. By Ellen S. Fish, Deputy.

No. 20103

Land Office at Seattle, Washington,
November 27th, 1903.

It is hereby certified that, in pursuance of law, Thomas B. Forsyth, residing at Palmer, in King County, State of Washington, on this day purchased of the Register of this Office the W½ of E½ of Section No. 34 in Township No. 22 N. of Range No. 7 East of the Will. Principal Meridian, Washington containing 160 acres, at the rate of Two dollar and 50 cents per acre, amounting to Four hundred dollars, for which the said Thomas B. Forsyth has made payment in full as required by law.

Now, therefore, be it known that, on presentation of this certificate to the Commissioner of the General Land Office, the said

Thomas B. Forsyth shall be entitled to receive a Patent for the lot above described.

J. HENRY SMITH, Register.

Endorsed: Duplicate filed. No. 20103. Cash Entry. Land Office at Seattle, Wash. Sec. 34, Town. 22 N., Range 7 E. Patent to contain reservation according to proviso to the Act of Aug. 30, 1890. Div. C. List 23. Approved June 4, 1904 by C. M. S., Clerk. Division C. Patented Aug. 3-1904. Recorded Vol. 146, Page 92.

COPP & LUCKETT,
Attorneys at Law,
Washington, D. C.

Pacific Building, 624 F Street, N. W.
Doc. No. Div.
Cash Ent. No. 20103
Seattle Dist. Wash.
C. & L. No. Jul 11, 1904.

Hon. Commissioner of the General Land Office:

Sir:

In the case of Thos. B. Forsyth involving W½ E½, Sec. 34, T. 22 N., R 7 E., we hereby enter our appearance for said Forsyth.

Please notify us of all action.

Very respectfully,

COPP & LUCKETT.

Endorsed: U. S. General Land Office. Received Jul. 11, 1904. 123264. Copp & Luckett, Washington, D. C., Jul. 11, 1904. Enter appearance for Thos. B. Forsyth in matter of C. E. No. 20103. Seattle Land District, Wash.

Endorsed: Complt's Exhibit B. Cause No. 1706. U. S. Circuit Court, West'n Dist. of Wash'n, N'n Div. Filed, Oct. 14, 1909. Roger S. Greene, Master &c.

Filed U. S. Circuit Court Western District of Washington, Jan. 28, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

COMPLAINANT'S EXHIBIT "C."

Department of the Interior,
General Land Office,
Washington, D. C., June 2, 1908.

I hereby certify that the annexed copies pages 1 to 27 inclusive, papers in H. E. No. 18040, C. C. E. No. 19465 of Odin A. Olsen, Seattle, Wash., land district, and letter "C" dated August 20, 1903, are true and literal exemplifications from the originals in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

(Seal) JOHN O'CONNELL,

Application No. 18040.

HOMESTEAD.

Land Office at Seattle, Wash.,
Aug. 5, 1901.

I, Odin A. Olsen, of Palmer, King County, Wash., do hereby apply to enter, under Section 2289, Revised Statutes of the United States, the NW¼ of Section 34, in Township 22 N. of Range 7 E., containing 160 acres. $2.50.

ODIN A. OLSEN.

Land Office at Seattle, Wash.,
Aug. 5th, 1901.

I, Edward P. Tremper, Register of the Land Office, do hereby certify that the above application is for Surveyed Lands of the class which the applicant is legally entitled to enter under Section 2289, Revised Statutes of the United States, and that there is no prior valid adverse right to the same.

EDWARD P. TREMPER, Register.

Indorsed: No. 18040. Homestead Application. Odin A. Olsen, Seattle, Wash. Aug. 5, 1901. Section 34, Town. 22 N., Range 7 E. 11-168 N. & E.

Receiver's Receipt, No. 18040. Application, No. 18040.

HOMESTEAD.

Receiver's Office, Seattle, Washington,
August 5th, 1901.

Received of Odin A. Olsen, of Palmer, Washington, the sum of Twenty-Two dollars; being the amount of fee and compensation of Register and Receiver for the entry of NW¼ of Section 34, in Township 22 N. of Range 7 East, W. M., under Section No. 2290, Revised Statutes of the United States.

160 acres at $2.50 per acre.

$22.00.

COLUMBUS T. TYLER, Receiver.

HOMESTEAD AFFIDAVIT.

Department of the Interior,
United States Land Office,

Seattle, Wash., Aug. 5th, 1901.

I, Odin A. Olsen, of Palmer, Wash., having filed my application No. 18040, for an entry under section 2289, Revised Statutes of the United States, do solemnly swear that I am not the proprietor of more than one hundred and sixty acres of land in any State or Territory; that I am over 21 years of age & a single man, and have declared my intention to become a citizen of the U. S.; that my said application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation, and that I will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that I am not acting as agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that I do not apply to enter the same

for the purpose of speculation, but in good faith to obtain a home for myself, and that I have not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation, or syndicate whatsoever, by which the title which I might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except myself, and further, that since August 30, 1890, I have not entered under the land laws of the United States, or filed upon, a quantity of land, agricultural in character, and not mineral, which, with the tracts now applied for, would make more than three hundred and twenty acres, and that I have not heretofore made any entry under the homestead laws.

ODIN A. OLSEN.

Sworn to and subscribed before me this 5 day of Aug., 1901, at my office at Seattle, in King County, Wash.

COLUMBUS T. TYLER, Receiver.

UNITED STATES OF AMERICA.

State of Washington,
County of Kittitas.—ss.

I, Odin A. Olsen, do solemnly declare on oath that it is bona fide my intention to become a citizen of the United States of America, and to renounce forever all allegiance and fidelity to all and every foreign Prince, Potentate, State or Sovereignty whatever and particularly to Oscar II, King of Norway and Sweden, whereof I am now a citizen or subject.

And I do swear that I will support the Constitution and Government of the United States of America.

ODIN A. OLSEN.

Subscribed and sworn to before me this 15th day of November, A. D. 1889.

T. B. WRIGHT,
Clerk of Superior Court of Kittitas County, Wash.

State of Washington,
County of Kittitas.

T. B. Wright, do hereby certify that the foregoing is a true and correct copy of the Original Declaration of Odin A. Olsen, an alien to become a citizen of the United States, as shown by the records of my office, in book 1, page 26.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at Ellensburg, County of Kittitas, State aforesaid, on this 18th day of November, 1889.

(Seal) T. B. WRIGHT,
Clerk of Superior Court of Kittitas County, Wash.

U. S. Land Office, Seattle, Washington, August 5, 1901.

I hereby certify that the foregoing is a true copy of the original Declaration of Intention of Odin A. Olsen to become a citizen of the United States as presented at this office.

EDWARD P. TREMPER, Register.

NON-MINERAL AFFIDAVIT.

United States Land Office,
Seattle, Washington, Aug. 5, 1901.

Odin A. Olsen, being duly sworn according to law, deposes and says that he is the identical person who is an applicant for Government title to the NW¼, Sec. 34, Tp. 22 N., R. 7 E., that he is well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto; that there is not, to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, or other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by

any person or persons; that said land is essentially non-mineral land, and that his application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes, and that his post-office address is Palmer, Wash.

ODIN A. OLSEN.

I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me known (or has been satisfactorily identified before me by Jos. W. Gregory), and that I verily believe him to be a credible person and the person he represents himself to be, and that this affidavit was subscribed and sworn to before me at my office in Seattle, Wash., within the Seattle land district, on this 5th day of Aug., 1901.

COLUMBUS T. TYLER, Receiver.

Receiver's Receipt, No. 18040. Application, No. 18040.

HOMESTEAD.

Receiver's Office, Seattle, Washington,
August 5th, 1901.

Received of Odin A. Olsen of Palmer, Washington, the sum of Twenty-Two dollars; being the amount of fee and compensation of Register and Receiver for the entry of NW¼ of Section 34, in Township 22 N. of Range 7 East, W. M., under Section 2290, Revised Statutes of the United States.

160 acres at $2.50 per acre.
$22.00.

COLUMBUS T. TYLER, Receiver.

NOTICE FOR PUBLICATION.

Land Office at Seattle, Wash.,
Feby. 25th, 1903.

Notice is hereby given that the following-named settler has filed notice of his intention to make final proof in support of his claim, and that said proof will be made before Register and Receiver at Seattle, Wash., on May 6th, 1903, viz:

Odin A. Olsen, of Palmer, Wash., for the NW¼, Sec. 34, Tp. 22 N., R. 7 E.

He names the following witnesses to prove his continuous residence upon and cultivation of said land, viz:

William Henricks, of Palmer, Wash.; Zach Turner, of Palmer, Wash.; J. Sloss, of Palmer, Wash.; Robt. L. Barbee, of Kanascat, Wash.

J. HENRY SMITH, Register.

NOTICE FOR PUBLICATION.

Department of the Interior,

Land Office at Seattle, Wash.,

February 25, 1903.

Notice is hereby given that the following named settler has filed notice of his intention to make final proof in support of his claim, and that said proof will be made before the Register and Receiver at Seattle, Wash., on May 6, 1903, viz: Odin A. Olsen, of Palmer, Wash., for the NW¼, Sec. 34, Township 22 N. Range 7 E.

He names the following witnesses to prove his continuous residence upon and cultivation of said land, viz:

William Heinricks of Palmer, Wash., Zack Turner of Palmer, Wash., J. Sloss of Palmer, Wash., Robert L. Barbee, of Kanaskat, Wash.

32-37 J. HENRY SMITH, Register.

AFFIDAVIT OF PUBLICATION.

State of Washington,
County of King.—ss.

D. C. Ashum, being first duly sworn, upon his oath deposes and says that he is the publisher of The Enumclaw Courier, a weekly newspaper, which, before and at the time herein stated and included, was printed and published in Enumclaw, in the county of King, state of Washington, once a week as a weekly newspaper, and was during all of said time of general circulation in said county of King; and that the homestead

notice, of which a printed copy is hereto attached, was published in full in said newspaper, and in every issue thereof, for six consecutive weeks, which said printed copy was always a precise counterpart and fac simile of the homestead notice so published, and that the date of first publication as aforesaid of said homestead notice was the 7 day of March, 1903, and the date of the last publication thereof was the 5th day of April, 1903.

D. C. ASHUM,

Second affidavit Subscribed and sworn to before me this fifth day of May, 1903.

(Seal) W. F. ECKHART,

Notary Public in and for the State of Washington, residing at Enumclaw.

CERTIFICATE AS TO POSTING OF NOTICE.

Department of the Interior,
United States Land Office,

At Seattle, Washington,
May 6, 1903.

I, J. Henry Smith, Register, do hereby certify that a notice, a printed copy of which is hereto attached, was by me posted in a conspicuous place in my office for a period of thirty days, I having first posted said notice on the 25th day of Feb., 1903.

J. HENRY SMITH, Register.

NO. 1.—HOMESTEAD.

Land Office at Seattle, Wash.,
Feby. 25th, 1903.

I, Odin A. Olsen, of Palmer, Wash., who made Homestead Application No. 18040 for the NW¼ Sec. 34, Tp. 22 N., R. 7 E., do hereby give notice of my intention to make final proof to establish my claim to the land above described, and that I expect to prove my residence and cultivation before Register and Receiver at Seattle, Wash., on May 6th, 1903, by two of the following witnesses:

William Henricks, of Palmer, Wash.; Zach Turner, of Palmer, Wash.; J. Sloss, of Palmer, Wash.; Robert L. Barbee, of Kanaskat, Wash.

ODIN A. OLSEN.

Land Office at Seattle, Wash.,
Feby. 26th, 1903.

Notice of the above application will be published in the Courier, printed at Enumclaw, Wash., which I hereby designate as the newspaper published nearest the land described in said application.

J. HENRY SMITH, Register.

AFFIDAVIT REQUIRED OF CLAIMANT.

(Section 2301 of the Revised Statutes of the United States.)

I, Odin A. Olsen, claiming the right to commute, under Section 2301 of the Revised Statutes of the United States, my homestead entry No. 18040, made upon the NW¼ section 34, township 22 N. range 7 E., do solemnly swear that I made settlement upon said land on the 15th day of August, 1901, and that since such date, to-wit, on the 15th day of August, 1901, I have built a house on said land, and have continued to reside therein up to the present time; that I have broken and cultivated one acre of said land, and that no part of said land has been alienated, except as provided in Section 2288 of the Revised Statutes, but that I am the sole *bona fide* owner as an actual settler.

I further swear that I have not heretofore perfected or abandoned an entry made under the homestead laws of the United States.

ODIN A. OLSEN.

Subscribed and sworn to before me this 6th day of May, 1903, at my office at Seattle, in King County, Washington.

LYMAN B. ANDREWS, Receiver.

NON-MINERAL AFFIDAVIT.

Department of the Interior,
United States Land Office,
Seattle, Washington, May 6, 1903.

Odin A. Olsen, being duly sworn according to law, deposes and says that he is the identical person who is an applicant for Government title to the NW¼ Sec. 34, Tsp. 22 N., R. 7 E; that he is well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto; that there is not, to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, or other valuable mineral deposit; that the land contains no salt spring, or deposits of salt in any form sufficient to render it chiefly valuable therefor; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that his application therefor is not made for the purpose of fraudulently obtaining title to the mineral land, but with the object of securing said land for agricultural purposes; and that his post-office address is Palmer, Wash.

ODIN A. OLSEN

I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified before me), and that I verily believe him to be a credible person and the person he represents himself to be, and that this affidavit was subscribed and sworn to before me at my office in Seattle, Washington, within the Seattle, Washington land district, on this 6th day of May, 1903.

LYMAN B. ANDREWS, Receiver

BEFORE THE COMMISSIONER OF THE GENERAL LAND OFFICE.

In the matter of C. E. No. 19,465, Seattle, Wash., of Odin A. Olsen

SUPPLEMENTAL PROOF.

State of Washington, County of .—ss

Robt. L. Barbee and J. Sloss being duly sworn, say that they are the identical persons of the above names who were examined as final proof witnesses on the commutation proof of Odin A. Olsen when he made the above described cash entry. Affiants say that in giving their testimony for the claimant, Olsen, as to his residence, improvements, and other acts of compliance with the homestead law, they referred to acts and improvements by Olsen done and made upon the NW¼, Sec. 34, T. 22 N., R. 7 E., in the Seattle Land District, and not elsewhere, and that all the statements made by them in their final proof testimony are true as to the above described land.

ROBT. L. BARBEE
JAMES SLOSS

Subscribed and sworn to before me this 9 day of September, 1904.

ZACH TURNER
Justice of the Peace
State of Washington, Durham Precinct

State of Washington, County of King.—ss.

I, Geo. B. Lamping, Auditor of King County, State of Washington, and legal custodian of the election records thereof hereby certify that Zach Turner, Esquire, the person subscribing the annexed Proof and before whom the same was taken, was at the date thereof, to-wit: Sep. 9 A. D., 1904, was and is now a duly elected, qualified and acting Justice of the Peace in and for Durham Precinct in said King County; that by virtue of his said office he is authorized to take acknowledgments and administer oaths, and that full faith and credit are and ought to be given all his official acts as such Justice of the Peace; and I further certify, that I am acquainted with

the handwriting of the said Zach Turner and verily believe the name subscribed to the said annexed instrument is his proper and genuine signature.

Witness my hand and official seal this 12th day of September A. D. 1904.

GEO. B. LAMPING
Auditor of King County, Washington.
(Seal) By L. T. McGuire, Deputy

HOMESTEAD PROOF—TESTIMONY OF WITNESS.

J. Sloss, being called as witness in support of the Homestead entry of Odin A. Olsen for final comm. proof, testifies as follows:

Ques. 1.—What is your name, age, and post-office address?

Ans.—J. Sloss: 55 years: Palmer, Wash., form. Ravensdale, Wash.

Ques. 2.—Are you well acquainted with the claimant in this case and the land embraced in his claim?

Ans.—I am.

Ques. 3.—Is said tract within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or business?

Ans.—It is not.

Ques. 4.—State specifically the character of this land—whether it is timber, prairie, grazing, farming, coal or mineral land.

Ans.—Generally good agricultural land.

Ques. 5.—When did claimant settle upon the homestead, and at what date did he establish actual residence thereon?

Ans.—He settled and established residence in August, 1901.

Ques. 6.—Have claimant and family resided continuously on the homestead since first establishing residence thereon? (If settler is unmarried, state the fact.)

Ans.—Claimant is unmarried. He has resided thereon continuously.

Ques. 7.—For what period or periods has the settler been absent from the land since making settlement, and for what

purpose; and if temporarily absent, did claimant's family reside upon and cultivate the land during such absence?

Ans.—Not more than a day or so each month to bring in food and supplies from Ravensdale, Wash.

Ques. 8.—How much of the homestead has the settler cultivated, and for how many seasons did he raise crops thereon?

Ans.—Has cultivated one acre. Has raised crops two seasons.

Ques. 9.—What improvements are on the land, and what is their value?

Ans.—A one room house of sawed lumber, shingled and sealed, a barn, a well, 600 yds. road, 1½ A. slashed, 1 A. cultivated, 225 yds. fence. Total value: $700.00.

Ques. 10.—Are there any indications of coal, salines, or minerals of any kind on the homestead? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans.—None to my knowledge.

Ques. 11.—Has the claimant mortgaged, sold, or contracted to sell, any portion of said homestead?

Ans.—He has not.

Ques. 12.—Are you interested in this claim; and do you think the settler has acted in entire good faith in perfecting this entry?

Ans.—I am not. I am sure that he is.

J. SLOSS

I hereby certify that the foregoing testimony was read to the witness before being subscribed and was sworn to before me this 6th day of May, 1903, at my office at Seattle in King County, Wash.

LYMAN B. ANDREWS, Receiver

HOMESTEAD PROOF—TESTIMONY OF WITNESS.

Robert L. Barbee, being called as witness in support of the Homestead entry of Odin A. Olsen for final comm. proof, testifies as follows:

Ques.1.—What is your name, age, and post-office address?

Ans.—Robert L. Barbee: 37 years: Durham, Wash.

Ques. 2.—Are you well acquainted with the claimant in this case and the land embraced in his claim?

Ans.—I am.

Ques. 3.—Is said tract within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or business?

Ans.—It is not.

Ques. 4.—State specifically the character of this land—whether it is timber, prairie, grazing, farming, coal or mineral land.

Ans.—It is good farming land.

Ques. 5.—When did claimant settle upon the homestead, and at what date did he establish actual residence thereon?

Ans.—Claimant settled and established residence about August, 1901.

Ques. 6.—Have claimant and family resided continuously on the homestead since first establishing residence thereon? (If settler is unmarried, state the fact.)

Ans.—Claimant is unmarried. He has resided thereon continuously thereon.

Ques. 7.—For what period or periods has the settler been absent from the land since making settlement, and for what purpose; and if temporarily absent, did claimant's family reside upon and cultivate the land during such absence?

Ans.—He has been absent one or two days a month to get in supplies.

Ques. 8.—How much of the homestead has the settler cultivated, and for how many seasons did he raise crops thereon?

Ans.—He has cultivated 1 A. cultivated. He has raised crops 2 seasons.

Ques. 9.—What improvements are on the land, and what is their value?

Ans.—A house, shingled, sealed and papered, a barn, 1½ slashes, 225 yds. fence, 600 yds. road, garden, well. Total value: $700.00.

Ques. 10.—Are there any indications of coal, salines, or minerals of any kind on the homestead? (If so, describe what

they are, and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans.—None as far as I could ascertain.

Ques. 11.—Has the claimant mortgaged, sold, or contracted to sell, any portion of said homestead?

Ans.—No.

Ques. 12.—Are you interested in this claim; and do you think the settler has acted in entire good faith in perfecting this entry?

Ans.—I am not. I think that he has.

ROBERT L. BARBEE

I hereby certify that the foregoing testimony was read to the witness before being subscribed and was sworn to before me this 6th day of May, 1903, at my office at Seattle in King County, Wash.

LYMAN B. ANDREWS, Receiver

HOMESTEAD PROOF—TESTIMONY OF CLAIMANT.

Odin A. Olsen, being called as a witness in his own behalf in support of homestead entry, No. 18040, for final commutation proof, testifies as follows:

Ques. 1.—What is your name, age, and post-office address?

Ans.—Odin A. Olsen: 42 years: Palmer, Wash.

Ques. 2.—Are you a *native-born* citizen of the United States, and if so, in what State or Territory were you born?

Ans.—I have declared my intention to become a citizen, evidence of which will be found with H. E. No. 18040.

Ques. 3.—Are you the identical person who made homestead entry, No. 18040, at the Seattle, Wash., land office on the fifth day of August, 1901, and what is the true description of the land now claimed by you?

Ans.—I am. NW¼, Sec. 34, Tsp. 22 N., R. 7 E.

Ques. 4.—When was your house built on the land and when did you establish actual residence therein? (Describe said house and other improvements which you have placed on the land, giving total value thereof.)

Ans.—My house was built and actual residence established

in August, 1901. The improvements consist of a one room house of sawed lumber, a barn, one acre cultivated, one and half acre slashed, 600 yds. road, fences and a small garden. Total value $700.00.

Ques. 5.—Of whom does your family consist; and have you and your family resided continuously on the land since first establishing residence thereon? (If unmarried, state the fact.)

Ans.—I am unmarried. I have resided on the land continuously.

Ques. 6.—For what period or periods have you been absent from the homestead since making settlement, and for what purpose; and if temporarily absent, did your family reside upon and cultivate the land during such absence?

Ans.—Not more than forty-five days in all. One or two days a month to bring in provisions, etc.

Ques. 7.—How much of the land have you cultivated each season, and for how many seasons have you raised crops thereon?

Ans. ½ acre, 1st year. 1 acre 2nd year. Have raised crops 2 seasons.

Ques. 8.—Is your present claim within the limits of an incorporated town or selected site of a city or town, or used in any way for trade and business?

Ans.—It is not.

Ques. 9.—What is the character of the land? Is it timber, mountainous, prairie, grazing, or ordinary agricultural land? State its kind and quality, and for what purpose it is most valuable.

Ans.—It is agricultural land.

Ques. 10.—Are there any indications of coal, salines, or minerals of any kind on the land? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans.—None to my knowledge.

Ques. 11.—Have you ever made any other homestead entry? (If so, describe the same.)

Ans.—I have not.

Ques. 12.—Have you sold, conveyed, or mortgaged any portion of the land; and if so, to whom and for what purpose?

Ans.—I have not.

Ques. 13.—Have you any personal property of any kind elsewhere than on this claim? (If so, describe the same, and state where the same is kept.)

Ans.—I have not.

Ques. 14.—Describe by legal subdivisions, or by number, kind of entry, and office where made, any other entry or filing not mineral), made by you since August 30, 1890.

Ans.—I have made none.

ODIN ANGEL OLSEN

I hereby certify that the foregoing testimony was read to the claimant before being subscribed and was sworn to before me this 6th day of May, 1903, at my office at Seattle in King County, Washington.

LYMAN B. ANDREWS, Receiver

FINAL AFFIDAVIT REQUIRED OF HOMESTEAD CLAIMANTS.

Section 2301 of the Revised Statutes of the United States.

I, Odin A. Olsen, having made a Homestead entry of the NW¼ Section No. 34 in Township No. 22 N of Range No. 7 E, subject to entry at Seattle, Wash., under section No. 2289 of the Revised Statutes of the United States, do now apply to perfect my claim thereto by virtue of section No. 2301 of the Revised Statutes of the United States; and for that purpose do solemnly swear that I have declared my intention to become a citizen of the United States; that I have made actual settlement upon and have cultivated and resided upon said land since the 15th day of Aug., 1901, to the present time; that no part of said land has been alienated, except as provided in section 2288 of the Revised Statutes, but that I am the sole bona fide owner as an actual settler; that I will bear true allegiance to the Government of the United States; and, further, that I have not heretofore perfected or abandoned an entry made under the homestead laws of the United States.

ODIN A. OLSEN

I, L. B. Andrews, of U. S. Land Office do hereby certify that the above affidavit was subscribed and sworn to before me this 6th day of May, 1903, at my office at Seattle in King County, Wash.

LYMAN B. ANDREWS, Receiver

Endorsed: Homestead Proof. Land Office at Seattle, Washington. Original Application No. 18040. Final Certificate No. 19465. Approved: J. Henry Smith, Register; Lyman B. Andrews, Receiver.

No. 19465

Receiver's Office at Seattle, Washington,
May 6, 1903

Received from Odin A. Olsen of Palmer, of King County, Washington, the sum of Four hundred dollars; being in full for the NW¼ of Section No. 34, in Township No. 22 N., of Range No. 7 E., containing 160 acres, at $2.50 per acre, $400.00.

Commuted Hd. No. 18040

LYMAN B. ANDREWS, Receiver

$1.50 testimony fee received. Number of written words, 665. Rate per 100 words 22½ cents.

Endorsed: U. S. General Land Office. Received Aug. 21, 1903. 142770.

262614. Filed for record at request of Grantee May 7, 1903, at 58 min. past 10 A. M. and recorded in Vol. 5 of Patents, page 417, Records of King County, Wash. Geo. B. Lamping, County Auditor. By Ellen S. Fish, Deputy.

No. 19465

Receiver's Office at Seattle, Washington,
May 6, 1903

Received from Odin A. Olsen of Palmer, of King County, Washington, the sum of Four hundred dollars; being in full for the NW¼ of Section No. 34, in Township No. 22 N., of Range No. 7 E., containing 160 acres, at $2.50 per acre, $400.00.

Commuted Hd. No. 18040

LYMAN B. ANDREWS, Receiver

$400.00 Commuted Hd. No. 18040.

$1.50 testimony fee received. Number of written words, 665. Rate per 100 wrods 22½ cents.

No. 19465

Land Office at Seattle, Washington, May 6, 1903.

It is hereby certified that, in pursuance of law, Odin A. Olsen, residing at Palmer, in King County, State of Washington, on this day purchased of the Register of this Office the NW¼ of Section No. 34 in Township No. 22 N. of Range No. 7 E. of the W. Principal Meridian, Wash. containing 160 acres, at the rate of two dollars and fifty cents per acre, amounting to four hundred dollars, for which the said Odin A. Olsen has made payment in full as required by law.

Now, therefore, be it known that, on presentation of this certificate to the Commissioner of the General Land Office, the said Odin A. Olsen shall be entitled to receive a Patent for the lot above described.

Comm. Hd. No. 18040. Patent to contain reservation according to proviso to the Act of Aug. 30, 1890.

J. HENRY SMITH, Register.

COPP & LUCKETT
Attorneys at Law
Washington, D. C.

Pacific Building, 624 F Street, N. W.
Doc. No.
Div. G
Cash Ent. No. 19465
Seattle Dist., Wash.
C. & L. No. 1794. Aug. 20, 1903.

Hon. Commissioner of the General Land Office:

Sir:

We hereby enter our appearance in the case of Odin A. Olsen involving NW¼, Sec. 34, T. 22 N., R. 7 E., as above, for claimant.

Please notify us of all action.

Very respectfully,

COPP & LUCKETT.

Endorsed: U. S. General Land Office. Received Aug. 21, 1903. 142772. Copp & Luckett, Washington, D. C., Aug. 20, 1903. Enter appearance for Odin A. Olsen in matter of C. E. No. 19465 Seattle Land District, Wash., Division C.

Indorsed: Complainant's Exhibit C, Cause No. 1706, U. S. Circuit Court, Western Dist. of Washington, Northern Division. Filed Oct. 14, 1909. Roger S. Greene, Master, etc.

Filed: U. S. Circuit Court, Western District of Washington, Jan. 28, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

COMPLAINANT'S EXHIBIT "D."

Department of the Interior,
General Land Office,
Washington, D. C., June 2, 1908

I hereby certify that the annexed copies pages 1 to 31 inclusive, of papers in H. E. No. 17839 C. C. E. No. 18977 Zachariah Turner Seattle, Wash., land district and papers relating thereto, are true and literal exemplifications from the originals in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

(Seal) JOHN O'CONNELL,
Acting Recorder of the General Land Office.

Application No. 17839

HOMESTEAD.

Land Office at Seattle, Wash., Sept. 10, 1900

I, Zachariah Turner, of Palmer, Wash., do hereby apply to enter, under Section 2289, Revised Statutes of the United States, the East half of the East half ($E\frac{1}{2}$—$E\frac{1}{2}$) of Section 34, in Township 22 N. of Range 7 E., containing 160 acres.

ZACHARIAH TURNER

Land Office at Seattle, Wash., Sept. 10th, 1900

I, Edward P. Tremper, Register of the Land Office, do hereby certify that the above application is for Surveyed Lands of the class which the applicant is legally entitled to enter under Section 2289, Revised Statutes of the United States, and that there is no prior valid adverse right to the same.

EDWARD P. TREMPER, Register.

Endorsed: No. 17839. Homestead Application. Zachariah Turner, Seattle, Wash., Sept. 10, 1900. Section 34, Town. 22 N., Range 7 E.

Receiver's Receipt, No. 17839 Application, No. 17839

HOMESTEAD.

Receiver's Office, Seattle, Washington,
September 11th, 1900

Received of Zachariah Turner of Palmer, Wash., the sum of Twenty Two dollars; being the amount of fee and compensation of Register and Receiver for the entry of E½ of E½ of Section 34 in Township 22 N. of Range 7 East, W. M., under Section No. 2290, Revised Statutes of the United States.

160 acres at $2.50 per acre.
$22.00

COLUMBUS T. TYLER, Receiver.

NON-MINERAL AFFIDAVIT.

United States Land Office,
Seattle, Wash., Sept. 10, 1900.

Zachariah Turner, being duly sworn according to law, deposes and says that he is the identical Zachariah Turner who is an applicant for Government title to the E½ E½, Sec. 34, Town. 22 N., R. 7 East; that he is well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that his personal knowledge of said land is such as to enable ehim to testify understandingly with regard thereto;

that there is not, to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, or other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that his application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes, and that his post-office address is Palmer, King Co., Wash.

ZACHARIAH TURNER

I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant (or has been satisfactorily identified before me by John Arthur), and that I verily believe him to be a credible person and the person he represents himself to be, and that this affidavit was subscribed and sworn to before me at my office in Seattle, Wash., within the Seattle land district, on this 10th day of September, 1900.

COLUMBUS T. TYLER.

HOMESTEAD AFFIDAVIT.

Department of the Interior,
United States Land Office,

Seattle, Wash., Sept. 10, 1900

I, Zachariah Turner, of Palmer, Wash., having filed my application No. 17839, for an entry under section 2289, Revised Statutes of the United States, do solemnly swear that I am not the proprietor of more than one hundred and sixty acres of land in any State or Territory; that I am a natural-born citizen of the United States, over the age of 21 years, and the head of a family; that my said application is honestly and in good faith made for the purpose of actual settlement and cultiva-

tion, and not for the benefit of any other person, persons, or corporation, and that I will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that I am not acting as agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that I do not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for myself, and that I have not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation, or syndicate whatsoever, by which the title which I might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except myself, and further, that since August 30, 1890, I have not entered under the land laws of the United States, or filed upon, a quantity of land, agricultural in character, and not mineral, which, with the tracts now applied for, would make more than three hundred and twenty acres, and that I have not heretofore made any entry under the homestead laws.

ZACHARIAH TURNER

Sworn to and subscribed before me this 10th day of September, 1900, at my office at Seattle in King County, Washington.

COLUMBUS T. TYLER, Receiver.

NOTICE FOR PUBLICATION.

Department of the Interior,
Land Office at Seattle, Wash., Nov. 12, 1901

Notice is hereby given that the following-named settler has filed notice of his intention to make final proof in support of his claim, and that said proof will be made before the Register and Receiver at Seattle, Wash., on January 9, 1902, viz: Zachariah Turner, Hd. Entry No. 17839, for the E½ of E½, Sec. 34, Town. 22 N., R. 7 East, W. M.

He names the following witnesses to prove his continuous residence upon and cultivation of said land, viz:

M. Creedican, J. M. McWilliams, Sam Richey, A. Fitch, all of Palmer, Wash.

EDWARD P. TREMPER, Register.

No. 1.—HOMESTEAD.

Land Office at Seattle, Wash., November 12, 1901

I, Zachariah Turner, of Palmer, Wash., who made Homestead Application No. 17839 for the E½ of E½, Sec. 34, Town. 22 N., R. 7 East, W. M., do hereby give notice of my intention to make final proof to establish my claim to the land above described, and that I expect to prove my residence and cultivation before the Register and Receiver at Seattle, Wash., on Jany. 9, 1902, by two of the following witnesses:

M. Creedican, J. M. McWilliams, Sam Richey, A. Fitch, all of Palmer, Wash.

ZACHARIAH TURNER

Land Office at Seattle, Wash., Nov. 12, 1901.

Notice of the above application will be published in the Argus printed at Auburn, Wash., which I hereby designate as the newspaper published nearest the land described in said application.

EDWARD P. TREMPER, Register.

Receiver's Receipt, No. 17839 Application, No. 17839

HOMESTEAD.

Receiver's Office, Seattle, Washington,
September 10th, 1900

Received of Zachariah Turner of Palmer, Wash., the sum of Twenty Two dollars; being the amount of fee and compensation of Register and Receiver for the entry of E½ of E½ of Section 34 in Township 22 N. of Range 7 East, W. M., under Section No. 2290, Revised Statutes of the United States.

160 acres at $2.50 per acre.

$22.00

COLUMBUS T. TYLER, Receiver.

NOTICE FOR PUBLICATION.

Department of the Interior,
Land Office at Seattle, Wash.,
November 12, 1901

Notice is hereby given that the following named settler has filed notice of his intention to make final proof in support of his claim, and that said proof will be made before the Register and Receiver at Seattle, Wash., on January 9, 1902, viz: Zachariah Turner. Hd. entry No. 17839 for the E ½ of E½ Sec. 34, Town. 22 N., R. 7 East, W. M.

He names the following witneesses to prove his continuous residence upon and cultivation of said land, viz:

M. Creedican, J. M. McWilliams, Sam Richey, A. Fitch, all of Palmer, Wash.

EDWARD P. TREMPER, Register.

Nov. 14-Jan. 8.

AFFIDAVIT OF PUBLICATION.

State of Washington, County of King.—ss

J. S. Rankin, being first duly sworn, upon his oath, deposes and says: that he is the publisher of "The Auburn Argus," which is a weekly newspaper which, before and at the time hereinafter stated and included, was printed and published in the Town of Auburn, in the County of King and State of Washington, once a week as a weekly newspaper; and was during all of said time of general circulation in said County of King; and that the notice for publication of which a printed copy is hereto attached, was published in full in said newspaper, and in every issue thereof, for seven consecutive weeks; which said printed copy was always a precise counterpart and fac simile of the notice for publication so published; and that the date of the first publication as aforesaid of said notice for publication was the 14th day of November, 1901, and the date of the last publication thereof was the 8th day of January, 1902.

J. S. RANKIN

Subscribed and sworn to before this 8th day of January, 1902.

(Seal) JAMES E. McGREW
Notary Public in and for the State of Washington, residing at Seattle, Wn.

CERTIFICATE AS TO POSTING OF NOTICE.

Land Office at Seattle, Washington, Jany. 9, 1902.

I, Edward P. Tremper, Register, do hereby certify that a notice, a printed copy of which is hereto attached, was by me posted in a conspicuous place in my office for a period of thirty days, I having first posted said notice on the 12th day of Nov., 1901.

EDWARD P. TREMPER, Register.

NON-MINERAL AFFIDAVIT.

Department of the Interior,
United States Land Office,
Seattle, Washington, Jany. 9, 1902

Zachariah Turner, being duly sworn according to law, deposes and says that he is the identical person who is an applicant for Government title to the E ½ E½ Sec. 34, Tp. 22 N., R. 7 E.; that he is well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto; that there is not, to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, or other valuable mineral deposit; that the land contains no salt spring, or deposits of salt in any form sufficient to render it chiefly valuable therefor; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of

said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that his application therefor is not made for the purpose of fraudulently obtaining title to the mineral land, but with the object of securing said land for agricultural purposes, and that his post-office address is Palmer, Wash.

ZACHARIAH TURNER

I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known, and that I verily believe him to be a credible person and the person he represents himself to be, and that this affidavit was subscribed and sworn to before me at my office in Seattle, Washington, within the Seattle land district, on this 9th day of January, 1902.

EDWARD P. TREMPER, Register.

AFFIDAVIT REQUIRED OF CLAIMANT.

I, Zachariah Turner, claiming the right to commute, under Section 2301 of the Revised Statutes of the United States, my homestead entry No. 17839, made upon the E½ E½ section 34, township 22 N. range 7 E., do solemnly swear that I made settlement upon said land on the 15th day of September, 1900, and that since such date, to wit: on the 15th day of September, 1900, I have built a house on said land, and have continued to reside therein up to the present time; that I have broken and cultivated 5 acres of said land, and that no part of said land has been alienated, except as provided in Section 2288 of the Revised Statutes, but that I am the sole *bona fide* owner as an actual settler.

I further swear that I have not heretofore perfected or abandoned an entry made under the homestead laws of the United States.

ZACHARIAH TURNER

Subscribed and sworn to before me this 9th day of January, 1902, at my office at Seattle, Washington in King County, Wash.

EDWARD P. TREMPER, Register.

AFFIDAVIT REQUIRED OF CLAIMANT.

I, Zachariah Turner, claiming the right to commute, under Section 2301 of the Revised Statutes of the United States, my homestead entry No. 17839, made upon the E½ E½ section 34, township 22 N. range 7 E., do solemnly swear that I made settlement upon said land on the 15th day of September, 1900, and that since such date, to wit: on the 15th day of September, 1900, I have built a house on said land, and have continued to reside therein up to the present time; that I have broken and cultivated 5 acres of said land, and that no part of said land has been alienated, except as provided in Section 2288 of the Revised Statutes, but that I am the sole *bona fide* owner as an actual settler.

I further swear that I have not heretofore perfected or abandoned an entry made under the homestead laws of the United States.

ZACHARIAH TURNER

Subscribed and sworn to before me this 2nd day of December, 1902, at my office at Seattle, Washington in King County, Wash.

LYMAN B. ANDREWS, Receiver.

HOMESTEAD PROOF—TESTIMONY OF WITNESS.

M. Creedican, being called as witness in support of the Homestead entry of Zachariah Turner for final proof, testifies as follows:

Ques. 1.—What is your name, age, and post-office address?

Ans.—M. Creedican, 49 years, Palmer, Wash.

Ques. 2.—Are you well acquainted with the claimant in this case and the land embraced in his claim?

Ans.—Yes.

Ques. 3.—Is said tract within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or business?

Ans.—No.

Ques. 4.—State specifically the character of this land—whether it is timber, prairie, grazing, farming, coal or mineral land.

Ans.—Agricultural land.

Ques. 5.—When did claimant settle upon the homestead, and at what date did he establish actual residence thereon?

Ans.—He settled upon the homestead and established actual residence thereon in September, 1900.

Ques. 6.—Have claimant and family resided continuously on the homestead since first establishing residence thereon? (If settler is unmarried, state the fact.)

Ans.—Yes.

Ques. 7.—For what period or periods has the settler been absent from the land since making settlement, and for what purpose; and if temporarily absent, did claimant's family reside upon and cultivate the land during such absence?

Ans.—He has not been absent to my knowledge.

Ques. 8.—How much of the homestead has the settler cultivated, and for how many seasons did he raise crops thereon?

Ans.—About 5 acres slashed, 3 acres cultivated. Raised crops 1 year.

Ques. 9.—What improvements are on the land, and what is their value?

Ans.—House, Barn, Chicken coup, Woodshed, Outbuilding, well, fencing. Total value about $900.00.

Ques. 10.—Are there any indications of coal, salines, or minerals of any kind on the homestead? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans.—Have never seen any.

Ques. 11.—Has the claimant mortgaged, sold, or contracted to sell, any portion of said homestead?

Ans.—Not to my knowledge.

Ques. 12.—Are you interested in this claim; and do you think the settler has acted in entire good faith in perfecting this entry?

Ans.—No. Yes.

M. CREEDICAN

I hereby certify that the foregoing testimony was read to the witness before being subscribed and was sworn to before

me this 9th day of January, 1902, at my office at Seattle, Washington in King County.

EDWARD P. TREMPER, Register.

HOMESTEAD PROOF—TESTIMONY OF WITNESS.

A. Fitch, being called as witness in support of the Homestead entry of Zachariah Turner for final proof, testifies as follows:

Ques.1.—What is your name, age, and post-office address?

Ans.—A. Fitch, 41 years; Palmer, Wash.

Ques. 2.—Are you well acquainted with the claimant in this case and the land embraced in his claim?

Ans.—Yes.

Ques. 3.—Is said tract within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or business?

Ans.—No.

Ques. 4.—State specifically the character of this land—whether it is timber, prairie, grazing, farming, coal or mineral land.

Ans.—Farming land.

Ques. 5.—When did claimant settle upon the homestead, and at what date did he establish actual residence thereon?

Ans.—About October 1900.

Ques. 6.—Have claimant and family resided continuously on the homestead since first establishing residence thereon? (If settler is unmarried, state the fact.)

Ans.—Yes.

Ques. 7.—For what period or periods has the settler been absent from the land since making settlement, and for what purpose; and if temporarily absent, did claimant's family reside upon and cultivate the land during such absence?

Ans.—Never been absent.

Ques. 8.—How much of the homestead has the settler cultivated, and for how many seasons did he raise crops thereon?

Ans.—About 5 acres slashed, 2 acres cultivated. Raised crops 1 year.

Ques. 9.—What improvements are on the land, and what is their value?

Ans.—House, Barn, Chicken Coup. Outhouse, Feed house, fencing, etc. Total value about $900.00.

Ques. 10.—Are there any indications of coal, salines, or minerals of any kind on the homestead? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans.—None that I know of.

Ques. 11.—Has the claimant mortgaged, sold, or contracted to sell, any portion of said homestead?

Ans.—Not to my knowledge.

Ques. 12.—Are you interested in this claim; and do you think the settler has acted in entire good faith in perfecting this entry?

Ans.—No. Yes.

A. FITCH

I hereby certify that the foregoing testimony was read to the witness before being subscribed and was sworn to before me this 9th day of January, 1902, at my office at Seattle, Washington in King County.

EDWARD P. TREMPER, Register.

HOMESTEAD PROOF—TESTIMONY OF CLAIMANT.

Zachariah Turner, being called as a witness in his own behalf in support of homestead entry, No. 17839, for final proof testifies as follows:

Ques. 1.—What is your name, age, and post-office address?

Ans.—Zachariah Turner, 36 years; Palmer, Wash.

Ques. 2.—Are you a native-born citizen of the United States, and if so, in what State or Territory were you born?

Ans.—Am native born citizen. Born in State of Illinois.

Ques. 3.—Are you the identical person who made homestead entry, No. 17839, at the Seattle, Washington land office on the 11th day of September, 1900, and what is the true description of the land now claimed by you?

Ans.—Yes. E½ E½, Sec. 34, Tp. 22 N., R. 7 E.

Ques. 4.—When was your house built on the land and when did you establish actual residence therein? (Describe said house and other improvements which you have placed on the land, giving total value thereof.)

Ans.—House was completed & actual residence established therein Oct. 5, 1900. House 20x30 ft. Barn 18x30 ft. Chicken coup 10x10 ft. 1100 yards picket & brush fence. Orchard 12 trees & small fruits. Total value $900 to $1000.00.

Ques. 5.—Of whom does your family consist; and have you and your family resided continuously on the land since first establishing residence thereon? (If unmarried, state the fact.)

Ans.—Wife & 5 children & my mother. Have resided on the land continuously since first establishing residence thereon.

Ques. 6.—For what period or periods have you been absent from the homestead since making settlement, and for what purpose; and if temporarily absent, did your family reside upon and cultivate the land during such absence?

Ans.—Never been absent.

Ques. 7.—How much of the land have you cultivated each season, and for how many seasons have you raised crops thereon?

Ans.—4 acres cultivated, 1 acre slashed & burnt. Raised crops 1 year.

Ques. 8.—Is your present claim within the limits of an incorporated town or selected site of a city or town, or used in any way for trade and business?

Ans.—No.

Ques. 9.—What is the character of the land? Is it timber, mountainous, prairie, grazing, or ordinary agricultural land? State its kind and quality, and for what purpose it is most valuable.

Ans.—Agricultural land & most valuable for agricultural purposes.

Ques. 10.—Are there any indications of coal, salines, or minerals of any kind on the land? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans.—Not any.

Ques. 11.—Have you ever made any other homestead entry? (If so, describe the same.)

Ans.—No.

Ques. 12.—Have you sold, conveyed, or mortgaged any portion of the land; and if so, to whom and for what purpose?

Ans.—No.

Ques. 13.—Have you any personal property of any kind elsewhere than on this claim? (If so, describe the same, and state where the same is kept.)

Ans.—No.

Ques. 14.—Describe by legal subdivisions, or by number, kind of entry, and office where made, any other entry or filing (not mineral), made by you since August 30, 1890.

Ans.—Never made any.

ZACHARIAH TURNER

I hereby certify that the foregoing testimony was read to the claimant before being subscribed and was sworn to before me this 9th day of January, 1902, at my office at Seattle, Washington in King County.

EDWARD P. TREMPER, Register.

FINAL AFFIDAVIT REQUIRED OF HOMESTEAD CLAIMANTS.

Section 2301 of the Revised Statutes of the United States.

I, Zachariah Turner, having made a Homestead entry of the E½ E½ Section No. 34 in Township No. 22 N. of Range No. 7 E., subject to entry at Seattle, Washington under section No. 2289 of the Revised Statutes of the United States, do now apply to perfect my claim thereto by virtue of section No. 2301 of the Revised Statutes of the United States; and for that purpose do solemnly swear that I am native born a citizen of the United States; that I have made actual settlement upon and have cultivated and resided upon said land since the 15 day of September, 1900, to the present time; that no part of said land has been alienated, except as provided in section 2288 of the Revised Statutes, but that I am the sole *bona fide* owner as an actual settler; that I will bear true allegiance

to the Government of the United States; and, further, that I have not heretofore perfected or abandoned an entry made under the homestead laws of the United States.

ZACHARIAH TURNER

I, Edward P. Tremper, of..................., do hereby certify that the above affidavit was subscribed and sworn to before me this 9th day of January, 1902, at my office at Seattle, Washington in King County.

EDWARD P. TREMPER, Register.

Endorsed: Commuted. Homestead Proof. Land Office at Seattle, Washington. Original Application No. 17839. Final Certificate No. 18977. Approved: J. Henry Smith, Register; Lyman B. Andrews, Receiver. Test'y Fees 1.60 Paid for 710 words at 22½ cts. per 100.

$400.00 purchase price of land tendered & refused this 9th January 1902.

No. 18977

Receiver's Office at Seattle, Washington,
December 2nd, 1902

Received from Zachariah Turner of Palmer, County of King, Wash., the sum of Four hundred dollars; being in full for the E½ of E½ of Section No. 34, in Township No. 22 N., of Range No. 7 East, W. M., containing 160 acres, at $2.50 per acre. Commuted homestead. $400.00

LYMAN B. ANDREWS, Receiver.

$1.60 testimony fee received. Number of written words, 710. Rate per 100 words 22½ cents. Paid on January 9, 1902.

Endorsed: 248185. Filed for record at request of Z. Turner, Dec. 2, 1902, at 45 min. past 11 A. M. and recorded in Vol. 5 of Patents, page 331, Records of King County, Wash. Geo. B. Lamping, County Auditor. By Ellen S. Fish, Deputy.

No. 18977

Land Office at Seattle, Washington,
December 2nd, 1902.

It is hereby certified that, in pursuance of law, Zachariah Turner, residing at Palmer, in King County, State of Wash-

ington, on this day purchased of the Register of this Office the E½ of E½ of Section No. 34 in Township No. 22 N. of Range 7 East of the Will. Principal Meridian, Washington, containing 160 acres, at the rate of Two dollars and 50 cents per acre, amounting to Four hundred dollars, for which the said Zachariah Turner has made payment in full as required by law.

Now, therefore, be it known that, on presentation of this certificate to the Commissioner of the General Land Office, the said Zachariah Turner shall be entitled to receive a Patent for the lot above described.

Patent to contain reservation according to proviso to the Act of August 30, 1890 (26 Stat., 391).

J. HENRY SMITH, Register.

Endorsed: Patent to contain reservation according to proviso to the Act of Aug. 30, 1890.

No. 18977. Cash Entry. Land Office at Div. C, List No. 88. Sec. 34, Town. 22 N., Range 7 E.

Pat. sent Nov. 27/03, Copp & Luckett, Washington, D. C.

Approved Oct. 17, 1903, by A. C. B., Clerk. Division C. Patented Nov. 2, 1903. Recorded Vol. 87, Page 432. 12-168.
Before the General Land Office.
In the matter of C. E. No. 18977 of
Zachariah Turner, Seattle, Wash.

SUPPLEMENTAL AFFIDAVIT OF WITNESSES.

State of Washington, County of Pierce.—ss

M. Creedican being duly sworn on his oath does say that he is the identical party who testified as witness in the final proof made in the above described cash entry on Jan. 9th, 1902. Affiant says that in giving his testimony and in speaking of the land on which the claimant Turner has lived and complied with the homestead law, he has reference solely to the E½ E½, Sec. 34, T. 22 N., R. 7 E., and he asks now that his testimony then given be applied to the above described land.

M. CREEDICAN

Subscribed and sworn to before me this 8 day of September, 1903.

ELI P. NORTON
Notary Public.

(Seal) Notary Public in and for the State of Washington, residing at Tacoma.

Department of the Interior,
United States Land Office,

Seattle, Wash., August 31st, 1903

Zachariah Turner, Esq.,
Palmer, Washington.

Sir:

In reference to H. E. No. 18977, E½ E½ Sec. 34, Twp. 22 N., R. 7 E., you are advised that under date of August 20th, 1903, the Honorable Commissioner of the General Land Office directs that you furnish an affidavit from each of the two witnesses who appeared in your behalf at the time you submitted proof upon your homestead entry that the testimony had special reference to the foregoing described tract of land, as it appears that the descripeion of the land was not set forth in the testimony.

Seventy days from notice are allowed within which to comply with the requirements of the Commissioner, or to appeal from his decision to the Honorable Secretary of the Interior, and upon your failure to take action within the time specified the case will be reported for appropriate action. A copy of the decision is inclosed.

Very respectfully,
J. HENRY SMITH, Register.

Before the General Land Office.
In the matter of C. E. No. 18977
of Zachariah Turner, Seattle, Wash.

SUPPLEMENTAL AFFIDAVIT OF WITNESSES.

State of Washington, County of..................—ss:

A. Fitch being duly sworn on his several oaths, do say that he is the identical party who testified as witness in the final

proof made in the above described cash entry on Jan. 9, 1902. Affiant says that in giving his testimony and in speaking of the land on which the claimant Turner has lived and complied with the Homestead Law, he had reference solely to the E½ E½ Sec. 34, T. 22 N., R. 7 E., and he asks now that his testimony then given be applied to the above described land.

A. FITCH

Subscribed and sworn to before me this 12 day of Sept. 1903.

W. F. ECKHART

(Seal) Notary Public.

Endorsed: In re C. E. No. 18977. Seattle, Wash. Zach Turner. Supplemental affdavits of Final Proof witnesses. U. S. General Land Office. Received Sep 21, 1903. 159536.

Palmer, Wash., Sept. 16-03.

Mr. Smith
Seattle, Land Office.

Yours of August 31-03, is at hand regarding affidavits of each of my witnesses regarding the H. E. No. 18977, will say I have succeeded in getting their signatures and have forwarded same to Washington, D. C.

Hoping to be satisfactory

I remain yours truly

ZACHARIAH TURNER

Homestead entry No. 17839, made Sept. 10/00.

Residence established Oct. 5/00.

Commutation proof made Jan. 9/02.

C. E. No. 18977, made Dec. 2/02, being withheld on account of mineral (coal) protest which was dismissed by "N" Oct. 6,/02.

ANDERSON.

Make special W. A. R. Aug. 19, 03. Comr.

COPP & LUCKETT,
Attorneys at Law,
Washington, D. C.
Pacific Building, 624 F Street, N. W.

In your relpy refer to numbers and Letters given below.

Div. "C". No. 1603. Aug. 15, 1903.

Hon. W. A. Richards,
Commissioner of the General Land Office,
Washington, D. C.
Sir:—

In the matter of C. E. No. 18977, Seattle, Washington, of Zach Turner, (commuted homestead) we call your attention to our letter of Jan. 20th last asking to have this entry made special for patenting. At that time you could not take such action for the reason that you discovered a number of uncanceled but expired coal declaratory statements on the land. By your letter "N" of the 13th inst. to the Seattle Office, you canceled all these coal filings, and relieved the final entry from suspension. As Mr. Turner's proof and payment were made on Jan. 9, 1903, we now renew the request made on Jan. 20th last and ask that the entry be made special so far as necessary not only for examination and approval but for the issuance of patent.

Very truly yours,

COPP & LUCKETT.

See me about this.—W. A. R.,Comr.

Endorsed: U. S. General Land Office. Received Aug. 17, 1903. 140258. Copp & Luckett, City. Aug. 15, 1903. Ask that C. E. No. 18977, Seattle, Wash., of Zach Turner be given its place for patenting as of the date of final proof.

COPP & LUCKETT,
Attorneys at Law,
Washington, D. C.
Pacific Building, 624 F Street, N. W..

In your reply refer to numbers and Letters given below.

Div. "C". No. 1603. Sept. 19, 1903.

Hon. W. A. Richards,
Commissioner of the General Land Office,
Washington, D. C.
Sir:—

In the matter of C. E. No. 18,977, Seattle, Washington, of Zachariah Turner, we file herewith the supplemental affidavits of his witnesses, properly identifying the land about which they testified in making final proof for him. A joint affidavit was prepared in the expectation that both witnesses would sign the same document, but as one of them had moved away it became necessary to prepare separate papers, thus accounting for the erasures in the affidavits. This action complies with your requirement of Aug. 20th last, and we ask that said entry be now patented.

Very respectfully,

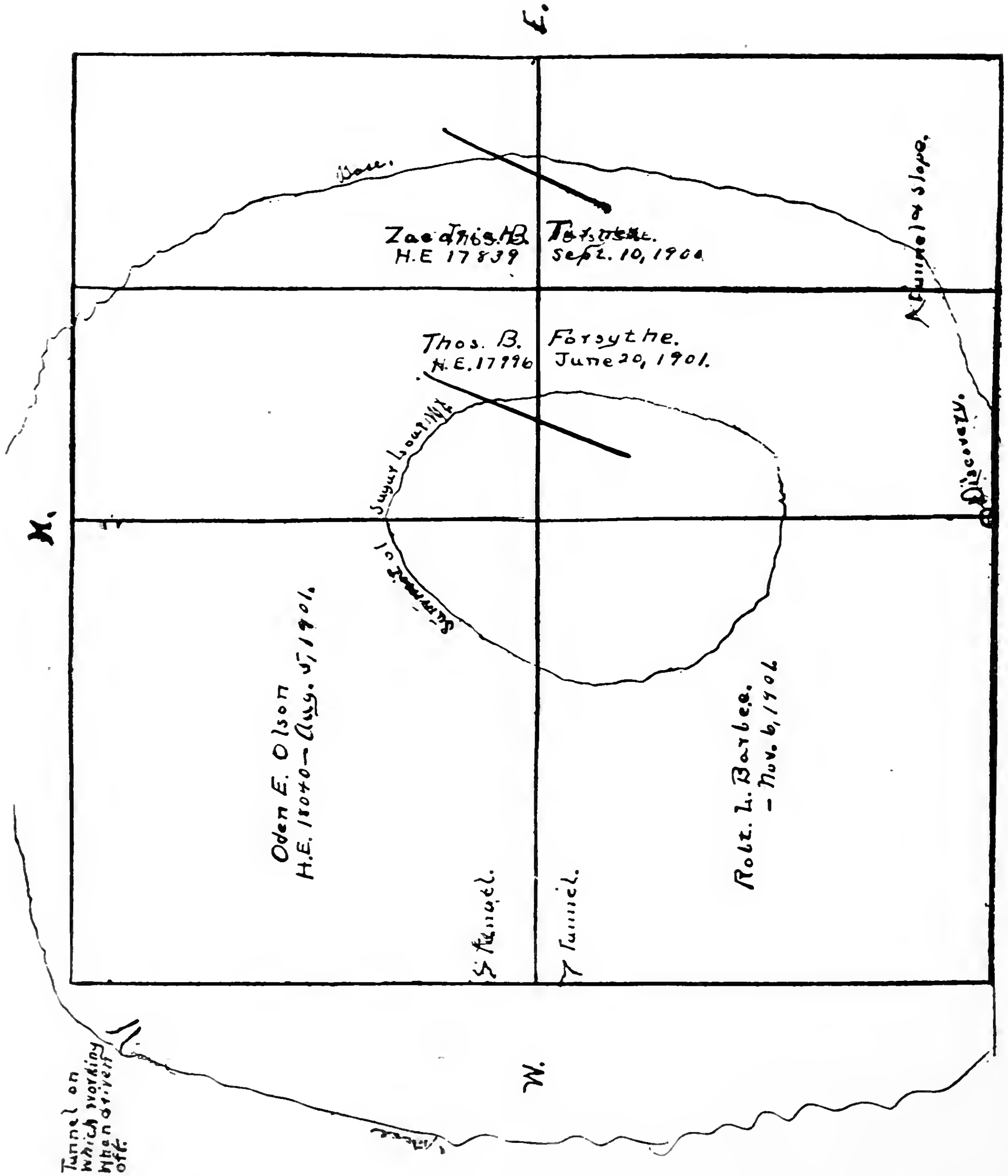
COPP & LUCKETT.

Endorsed: U. S. General Land Office. Received Sep 21, 1903. 159536. Copp & Luckett, City. Sep. 19, 1903. File supplemental affidavit by F. P. Witnesses in C. E. No. 18977, Seattle, Wash.

Endorsed: Complainants Exhibit D. Cause No. 1706. U. S. Circ. Court, Western Dist. of Washington, Northern Division. Filed Oct. 14, 1909. Roger S. Greene, Master, &c.

Filed U. S. Circuit Court, Western District of Washington, Jan. 28, 1910. A. Reeves Ayres, Clerk, W. D. Covington, Deputy.

COMPLAINANT'S EXHIBIT "E."



COMPLAINANT'S EXHIBIT "F."

THE PACIFIC COAST COMPANY

J. C. Ford, Vice-Pres't and Gen'l Mgr.

Seattle, October 19, 1909.

Hon. Roger S. Greene,
U. S. Master in Chancery,
Room 303 Federal Building, Seattle.

Dear Sir:

I herewith enclose copies of exhibits which I produced and testified in regard to, before you in the case of United States of America vs. Washington Securities Company, on Friday, the 15th instant.

I have had these copies compared with the originals and am assured they are correct copies.

Yours truly,
J. C. FORD,
Vice-Pres't & Gen'l Mgr.

Enc.

Endorsed: This enclosed to me copies of letters, which copies are marked Exhibits F, G, H, I, & J, & was received by me and filed this 20th day of Oct., 1909, in Cause No. 1706, U. S. Circ. Ct., West'n Dist. of Wash., No. Div. Roger S. Greene, Master &c.

Personal COPY

OREGON IMPROVEMENT COMPANY.

San Francisco, Nov. 8, 1890.

C. J. Smith Esq., Seattle.

Dear Sir:

At the conclusion of a fight conducted for us by Mr. Jas. McNaught and growing out of an error of our Mining Supt. I was enabled to get from Smithers and Whitworth a declaration that I had a 1/3 interest in Section 34 of the Township north of the one in which Franklin mine was situated.

They would not give it to the O. I. Co., but only to me and I made a private declaration of Trust to the O. I. Co. at

the time. It was then regarded as a valuable section and for a long time afterward we were figuring upon an extension of our lines in its direction. It is unsurveyed land and requires to be held. Various reports have been made to me about its valuee. Some favorable, some otherwise. We have been contributing 1/3 of the expense of holding it. When Mr. McNeill first came to Seattle, I asked him to have it examined and pass final judgment on it. If it be good, we want to keep it, otherwise we want to let it go. I have several times written him to advise me regarding it but he has never replied. During my last visit to Seattle he promised to send Mr. Corey to make a report on it but I have as yet heard nothing. Will you please take the matter up and advise me whether the Company should longer contribute towards the cost of maintaining possession.

Yours truly,

JOHN L. HOWARD.

Certified a true copy of papers in files of The P. C. Co.—J.C.F.

Endorsed: 1706. F. U. S. Circuit Court, Western District of Washington, Northern Division, U. S. v. Washington Securities Co., Plff's Exhibit F. Filed. Roger S. Greene, Master.

Filed U. S. Circuit Court, Western District of Washington, Jan. 28, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

COMPLAINANT'S EXHIBIT "G."

COPY

OREGON IMPROVEMENT COMPANY.
Joseph Simon Receiver.

San Francisco, December 8th, 1890.

C. J. Smith, Esq.,
General Manager, Seattle, Washington.

Dear Sir:

I enclose a letter from F. H. Whitworth who is acting as agent for the parties who have taken up Section 34, which is in the Township North of the one containing our Franklin

Mine. A one-third interest in this section was obtained by me, ostensibly for myself, but really for the Company, several years ago, and at the time I made a declaration of trust to the Oregon Improvement Co., which it has since held. Ostensibly I have been paying the money to Whitworth out of my own pocket, but really it has been the Company's check.

I brought this matter to the attention of Mr. McNeill when he first came with the concern and asked him if he would not please examine it himself, or have it examined, to see whether it was worth while for us to continue paying our proportion of the expense of holding this unsurveyed land until it could be bought. I have repeatedly brought this to his attention, but have never yet been able to get an opinion. Last year I undertook to arrange for the settlement of this matter through the Seattle office. Mr. Whitworth replied that the original agreement was that I should be the owner of the one-third interest in that land, and it was never intended that the O. I. Co. should own it, and they did not propose to allow me to set it over.

Here is an expense of the Company's which was incurred prior to the appointment of the Receiver. I feel that I have no right to pay it. If he draws upon me and I fail to protect the draft, the Company will probably lose its interest in this land, for which it has been paying one-third of the expense. Will you please pass upon this matter as soon as you receive this letter, and advise me whether I shall pay or not.

Yours truly,

JOHN L. HOWARD,

Manager.

Certified a true copy of papers in the files of The Pacific Coast Co.—J. C. F.

Endorsed: G. 1706. U. S. Circuit Court, Western District of Washington, Northern Division. U. S. v. Washington Securities Co. Pltffs Exhibit G. Filed, Roger S. Greene, Master &c.

Filed U. S. Circuit Court, Western District of Washington, Jan. 28, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

COMPLAINANT'S EXHIBIT "H."

(Form 224) COPY

OREGON IMPROVEMENT COMPANY.
Seattle Department.

The Columbia & Puget Sound R. R. Co.,
The Franklin Coal Mines and store,
The Newcastle Coal Mines and store,
The O. I. Co's Saw Mills at Seattle,
The Local Coal business at Seattle.

Seattle, Washington, Dec. 9, 1890.

H. W. McNeill, Esq., Seattle, Wash.
Dear Sir:

Please let me know what you think of Section 34 marked on the map in the name of J. L. Howard. Is there anything in it, or have you ever made any examination of it?

Yours truly,
C. J. SMITH,
General Manager.

Correct copy.—J. C. Ford.

Endorsed: H. 1706. U. S. Circuit Court, Western District of Washington, Northern Division. U. S. v. Washington Securities Co. Pltffs Exhibit H. Filed, Roger S. Greene, Master, &c.

Filed U. S. Circuit Court, Western District of Washington, Jan. 28, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

COMPLAINANT'S EXHIBIT "I."

COPY

Seattle, Washington, January 13, 1897.

John L. Howard, Esq.
Dear Sir:

I have not sent you the acct of Sect 34 for two years. It was small for each year therefore did not attend to it promptly.

I send the two years act in this:

Dont you want to buy out some or all of our interests. McGuire and I would be glad to dispose of our shares (we each

own 2/15) at a low price, and I think Colman & Smithers would also, or do you know of anyone else who wants to buy a good section of coal cheap?

As you will see your share of expenses for the two years is $51.85.

Yours truly,

F. W. WHITWORTH.

Certified a true copy of papers in the files of The Pacific Coast Company.—J. C. Ford.

COPY

SECTION 34.

To expenses 1895.				
James McGuire & asts.			42.50	
Refiling R. L. Thorne		25.00		
Filing fees		3.00	28.00	
				$70.50
To expenses 1896.				
James McGuire & asts.			56.00	
Refiling R. L. Thorne		25.00		
Filing fees		3.00	28.00	
				$84.00
				$154.50
Total ex. two years		154.50		
1/3 " " "	51.50			
Due from J. L. Howard			$51.50	

Seattle, January 13th 1897.

F. H. WHITWORTH, Agt.

Certified a true copy of papers in files of The Pacific Coast Company.—J. C. Ford.

Endorsed: I. 1706. U. S. Circuit Court Western District of Washington, Northern Division. U. S. vs. Washington Securities Co. Pltff's Exhibit I. Filed, Roger S. Greene, Master &c.

Filed U. S. Circuit Court, Western District of Washington, Jan. 28, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

COMPLAINANT'S EXHIBIT "J."

No. 174

OREGON IMPROVEMENT COMPANY
C. J. Smith, Receiver

To John L. Howard, Manager, Dr.
Address San Francisco, Cal.

1/22, 1897 For amount advanced to cover Expenses in refiling & ect on Section 34 in 1895 and 1896 as per letter of F. H. Whitworth to Jno. L. Howard, dated 1/13/97, attached,

Jas. McGuire et al, 1895	42.50
Refiling R. L. Thomas, 1895	25.00
Filing Fee, 1895	3.00
Jas. McGuire et al, 1896	56.00
Refiling, 25.00; Filing Fee, 3.00, 1896	28.00
	154.50
This Company's Propn, 1/3	51.50

Approved: (Sg) C. J. Smith, Receiver and General Manager.

Receipt (old form) (Sg) John L. Howard.

Correct: (Sg) McA.

Audit No. 174. Month of December, 1896. Chargeable to Constrn and Property Coal Lands Sec 34. Approved (Sg) Jno T. Campion. Stamped: Paid Oregon Improvement Co, C. J. Smith, Receiver, Jan 30 1897 Seattle, Wash.

Endorsed: J. No. 1706. U. S. Circuit Court, Western District of Washington, Northern Division. Complt's Exhibit J. Filed, Roger S. Greene.

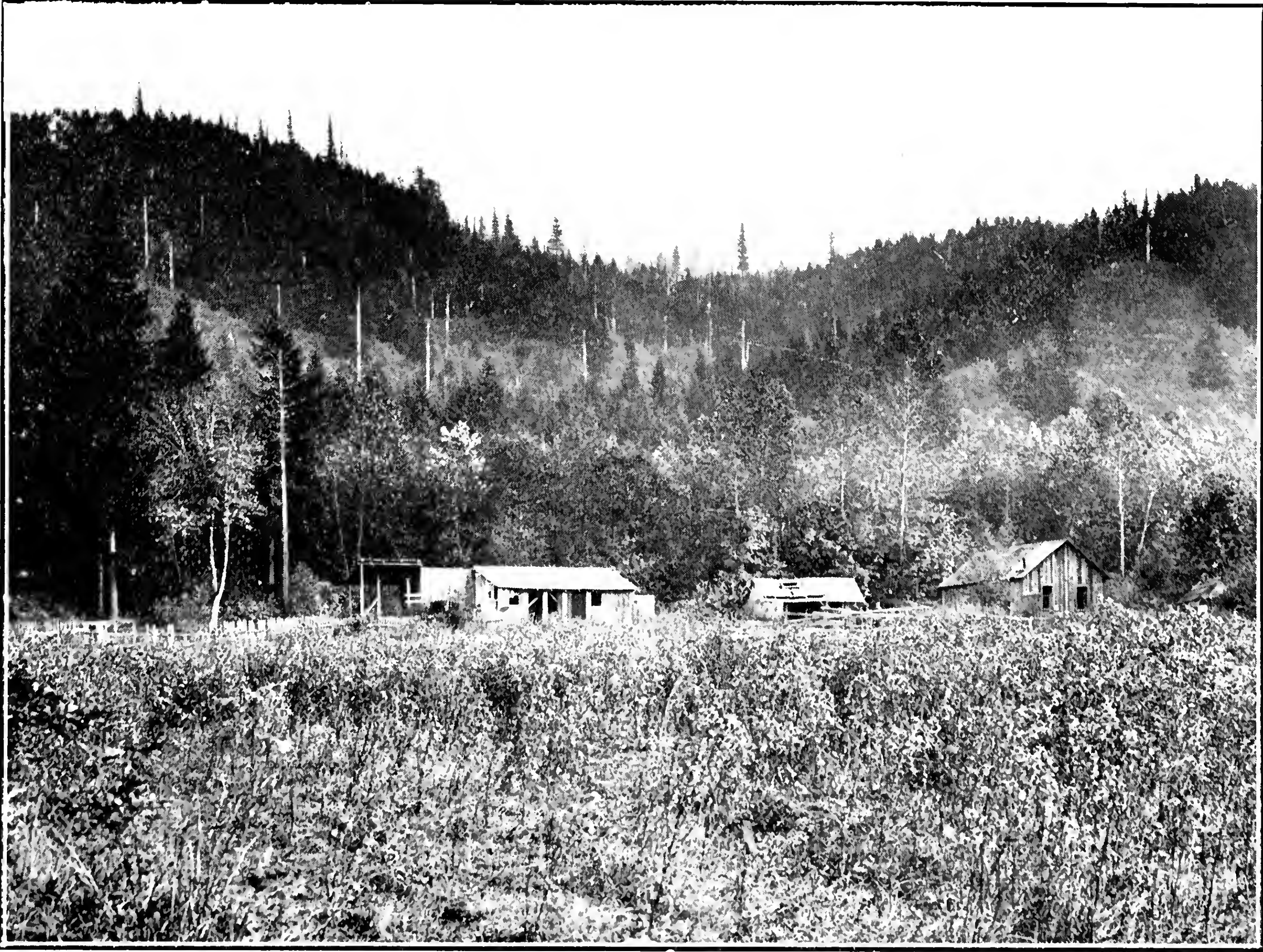
U. S. Circuit Court, Western Dist. of Washington, Northern Division. U. S. vs. Washington Securities Co. Pltff's Exhibit J. Roger S. Greene, Master &c.

Filed U. S. Circuit Court, Western District of Washington, Jan. 28, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

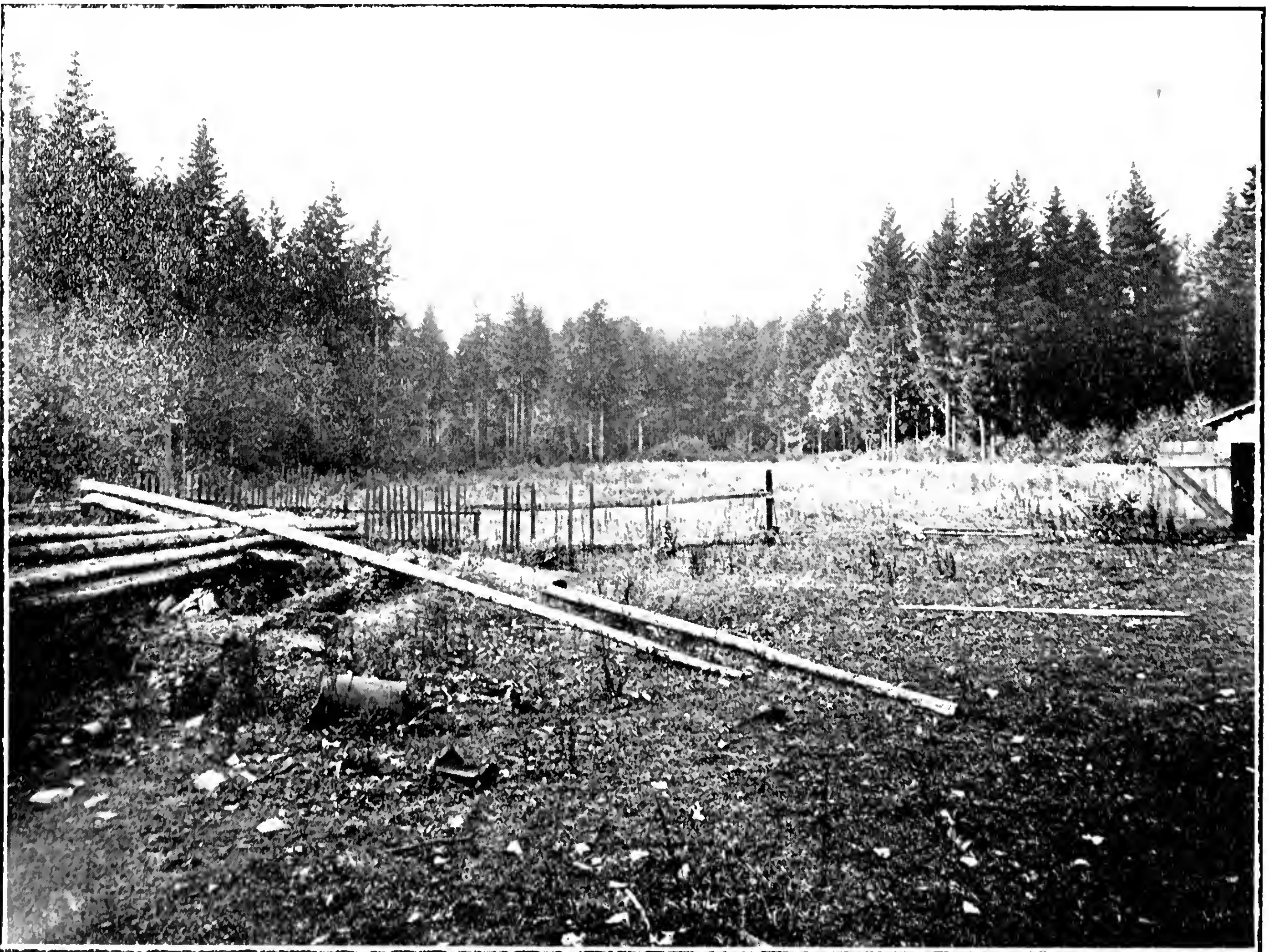
Certified a true copy of paper in files of The P. C. Co (as far as this new form of stationery will permit).

DEFENDANT'S EXHIBIT No. 1.—R. L. Barbee's Clearing on S. W. ¼ of Section 34, Township 22, N. R. 7, E. W. M.

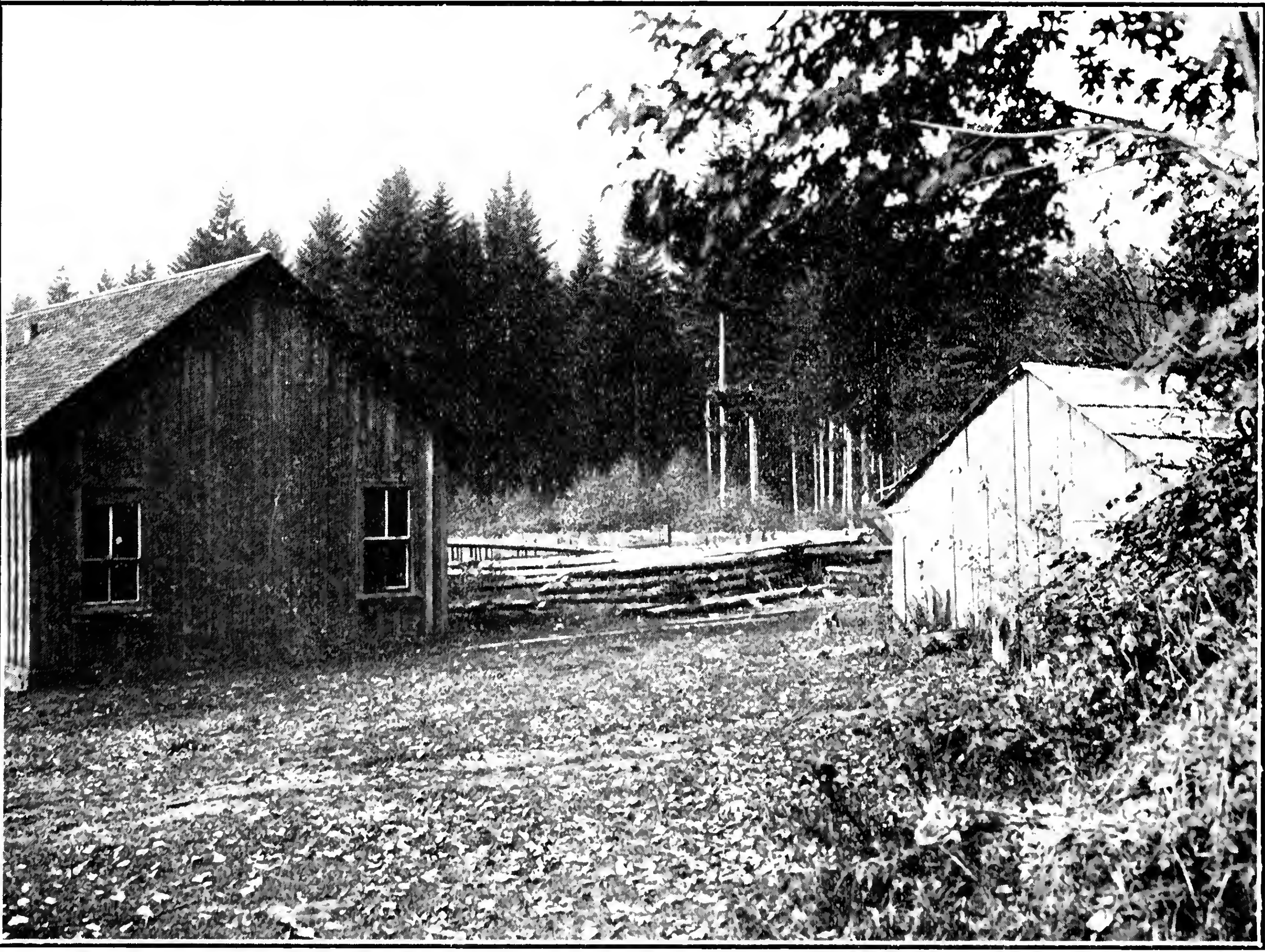
DEFENDANT'S EXHIBIT No. 2.—T. B. Forsyth's Clearing on W. ½ of E. ½ Section 31, Township 22, N. R. 7, E. W. M.



DEFENDANT'S EXHIBIT No. 3.—Z. Turner's Clearing on E. ½ of E. ½ Section 34, Township 22, N. R. 7, E. W. M.



DEFENDANT'S EXHIBIT 4.—Z. Turner's Clearing on E. ½ of E. ½ Section 34, Township 22, N. R. 7, E. W. M.



DEFENDANT'S EXHIBIT 5.—Sugar Loaf Mountain from Turner's Clearing on E. ½ of E. ½ Section 31, Township 22, N. R. 7, E. W. M.

DEFENDANT'S EXHIBIT No. 6.—O. Olson's Clearing on N. W. ¼ of Section 34, Township 22, N. R. 7, E. W. M.

DEFENDANT'S EXHIBIT No. 7.—O. Olson's Clearing on N. W. ¼ of Section 34, Township 22, N. R. 7, E. W. M.

DEFENDANT'S EXHIBIT No. 8.—Sugar Loaf Mountain from O. Olson's Clearing on N. W. ¼ of Section 34, Township 22, N. R. 7, E. W. M.

United States Circuit Court, Western District of Washington, Northern Division.

UNITED STATES OF AMERICA, *Complainant*
vs.
WASHINGTON SECURITIES COMPANY, a corporation, *Defendant.*

No. 1706.
Filed Jan. 12, 1911.

MEMORANDUM DECISION ON THE MERITS.

This suit is prosecuted by the Government to cancel patents alleged to have been illegally issued for lands containing valuable deposits of coal and to recover the land. The patents were issued under the homestead law to individuals who entered as trespassers, after several thousand dollars had been expended in the development of a coal mine. The land is situated in a coal district, the pleadings admit that it contains workable veins of coal and the evidence proves that the defendant corporation bought it as coal land, relying upon the report of a mining expert as to its mineral value and upon an abstract of the record as to the nature and condition of the title. The coal was discovered in the year 1882 and the discoverer with three other well known citizens then formed a syndicate and expended over $8000.00 in exploiting the mine; and to maintain their possession against claim jumpers, they were compelled to engage in litigation which terminated in a compromise arrangement by which John L. Howard, an agent of the Oregon Improvement Company, was admitted to membership in the syndicate and that Company became a contributor to its treasury. Afterwards the several patentees entered into possession and excluded the coal syndicate by force and threats of violence. The land office records contain evidence that the homestead claims were disputed, an application to purchase one quarter section as coal land, was made, and the price $3200.00 was tendered, but the officers of the District Land Office rejected the coal claim and refused to re-

ceive the money tendered, and thereafter the homestead claimants were permitted to commute their entries, and patents were issued to them under the provisions of law authorizing homestead claimants to purchase for cash, in lieu of compliance with the requirements as to residence and cultivation. The evidence contains no explanation of the conduct of the land office officials in allowing the homestead entries in preference to the coal claims, and accepting $400.00 for a quarter section rather than $3200.00.

No complete transcript of the land office records affecting the land has been offered in evidence and it must be inferred from lack of evidence to the contrary, that there was no formal contest between the syndicate and the patentee's, that without permitting the introduction of evidence the coal claim was arbitrarily rejected and no appeal was taken. The patentee's at the time of initiating their claims knew of the discovery of coal and the extent of development work by the syndicate. When their final proofs were submitted, the Register and Receiver of the local Land Office were apprised of adverse claims and by inquiry could readily have obtained as much information concerning the mineral character of the land as the government has submitted for the guidance of this Court in the decision of this case. When the respondent purchased the land, its officers knew that the land contained valuable deposits of coal, and that the government's title had been conveyed to homestead settlers who had made but a sorry pretense of farming.

If this Court were free to render a decision on general principles, I would take the ground that the United States government as proprietor of the public domain has by laws enacted by Congress, classified the lands, ownership of which may be acquired by individuals, and fixed the minimum prices to be paid therefor, varying according to the supposed differences in value between lands of the different classes. That according to the schedule of prices the land in controversy, if classified as coal land, should have been sold for $20.00 per acre instead of $2.50 per acre, the price of non-mineral land. That the government by its laws has constituted an agency for managing the public domain, known as the Land Depart-

ment being a bureau of the Department of the Interior, and conferred upon that agency, power as a special tribunal to determine all questions of fact to be acted upon in the administration of its business as a land agency, including the facts with respect to each particular tract of land, as to its proper classification and the price for which, and the conditions upon which ownership thereof may be conveyed to individuals, its findings being conclusive unless impeached for fraud. That the issuance of patents conveying titles to the respective commuters of homestead entries, was the consummation of violations of law for which the commuters and the officers of the Land Department were mutually culpable. That the defendant at the time of purchasing the land had actual knowledge that when the commutation entries were allowed, the land was known to be coal land and should have been sold as coal land only, to purchasers authorized by law to make entry of coal land in limited quantities as prescribed by law; and knew that the officers of the land office had, contrary to their duty, allowed the entries and issued patents as if the land were rightfully classed as non-mineral land, and with that knowledge purchased the land from the patentees, paying therefor what appeared to be a fair price for undeveloped coal land. That having so purchased the land with knowledge of the facts tainting the title, the defendant, as the successor in interest, shoul dsuffer the consequences of the legal wrong of its vendors, and being so placed in their shoes, it should also be subrogated to their rights. And that in view of the mutual faults to be imputed to the litigants respectively, the complainant should be held to the rule that, he who in a court of equity, seeks equitable relief, should do equity on his part, which in this case would require payment to the defendant of the purchase money received from the commuters, as a condition precedent to the cancelling of the patents, and as that seems to be impracticable, the case should be dismissed.

The Court is not free, however, to apply in this case that wholesome principle of equity jurisprudence embodied in the maxim that he who seeks equity should do equity, because in a case similar to this, the Supreme Court of the United States has established a rule that, the government of the United States

cannot be subjected to that rule, when it is a complainant seeking restoration to the public domain of land which individuals have attempted to acquire by illegal, or fraudulent, practices.

United States v. Trinidad Coal Co., 137 U. S. 160.

Upon the authority of that decision, the Court directs that a decree be entered in accordance with the prayer of the bill of complaint.

C. H. HANFORD,
Judge.

Endorsed: Memorandum Decision on the Merits. Filed U. S. Circuit Court, Western District of Washington, Jan. 12, 1911, Sam'l D. Bridges, Clerk, W. D. Covington, Deputy.

United States Circuit Court, Western District of Washington, Northern Division.

UNITED STATES OF AMERICA,
Complainant,
vs.
WASHINGTON SECURITIES COMPANY, a corporation,
Defendant.

No. 1706.
DECREE.

This cause came on to be further heard at this term upon the pleadinigs and proofs and upon the briefs submitted by counsel, and thereupon upon consideration thereof:

It is Ordered, Adjudged and Decreed, That the homestead patent heretofore issued by the complainant through its officers on the 2nd day of November, 1904, to Zachariah Turner, purporting to convey title to the east one-half (E½) of the east one-half (E-½) of Section thirty-four (34), Township twenty-two (22) North of Range seven (7) East of the Williamette Meridian, be, and the same is hereby cancelled, annulled and set aside:

And that the homestead patent heretofore issued by the complainant through its officers on the 1st day of November, 1904, to Odin A. Olsen, purporting to convey title to the north-west

quarter (NW-¼) of Section thirty-four (34), Township twenty-two (22) north of range seven (7) East of the Willamette Meridian, be and the same is hereby cancelled, annulled and set aside:

And that the homestead patent heretofore issued by the complainant through its officers on the 12th day of December, 1904, to Robert L. Barbee, purporting to convey title to the southwest quarter (SW-¼) of section thirty-four (34), Township twenty-two (22) North of Range seven (7) East of the Willamette Meridian, be and the same is hereby cancelled, annulled and set aside:

And that the homestead patent heretofore issued by the complainant through its officers on the 3rd day of August, 1907, to Thomas B. Forsyth, purporting to convey title to the west one-half (W-½) of the north-east quarter (NE-¼), and the west one-half (W½) of the south-east quarter (SE-¼) of Section thirty-four (34), Township twenty-two (22), North of Range Seven (7), be and the same is hereby cancelled, annulled and set aside.

And it is Further Ordered, Adjudged and Decreed, That the defendant and all persons claiming by, through or under it, be foreclosed of all interest, right, or title to said Section thirty-four (34), Township twenty-two (22), North of Range seven (7) East of the Willamette Meridian, and that the complainant is, and it is hereby decreed to be the legal and equitable owner of said lands, and that its title be confirmed and quieted, and that the complainant do have and recover its costs of the defendant.

Done this 25th day of February, 1911.

C. H. HANFORD,
Judge.

To the above decree, and each and every part thereof, the defendant prays an exception, which exception is hereby allowed.

C. H. HANFORD,
Judge.

Endorsed: Decree. Filed U. S. Circuit Court, Western District of Washington, Feb. 25, 1911, Sam'l. D. Bridges, Clerk, W. D. Covington, Deputy.

United States Circuit Court, Western District of Washington, Northern Division.

UNITED STATES OF AMERICA,
Complainant,
vs.
WASHINGTON SECURITIES COMPANY, a corporation,
Defendant.

No. 1706.

PETITION FOR APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND ORDER ALLOWING THE SAME.

To the Honorable the Circuit Court of the United States, for the Western District of Washington:

The above named defendant, Washington Securities Company, conceiving itself aggrieved by the decree made and entered by said Court on the 25th day of February, 1911, in the above entitled cause, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors filed herein, and prays that this appeal may be allowed, that citation issue to the complainant herein upon said appeal, and that a transcript of the record, proceedings and papers on which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 2nd. day of March, A. D. 1911.

CHARLES P. SPOONER,
H. R. CLISE,
Solicitors for Defendant.

The foregoing claim of appeal is allowed.

Dated this 2d day of March, A. D. 1911,

C. H. HANFORD,
United States District Judge, presiding in the above named Court.

Endorsed: Petition for Appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and order allowing the same. Filed U. S. Circuit Court, Western District of Washington, Mar. 2, 1911, Sam'l. D. Bridges, Clerk, W. D. Covington, Deputy.

United States Circuit Court, Western District of Washington, Northern Division.

UNITED STATES OF AMERICA, *Complainant,*
vs.
WASHINGTON SECURITIES COMPANY, a corporation, *Defendant.*

No. 1706.
Assignment of Errors.

Now on this 27th day of February, A. D. 1911, comes Washington Securities Company, defendant in the above entitled cause, by Charles P. Spooner and H. R. Clise, its solicitors, and says that the decree in said cause is erroneous and against the just rights of the above named defendant, and that in the record and proceedings of the above named cause and in the final decree made and entered therein on the 25th day of February, 1911, there was manifest error. And for errors the said defendant assigns the following:

I.

The court erred in finding that Section Thirty-four (34), Township Twenty-two (22), North of Range Seven (7) East of the Willamette Meridian, was known coal land at and prior to the date of the homestead entries of Zachariah Turner, Odin A. Olsen, Robert L. Barbee and Thomas B. Forsyth.

II.

The court erred in finding that Section Thirty-four (34), Township Twenty-two (22), North of Range Seven (7), East of the Willamette Meridian, was known coal land at the dates of the issuance of patents to said Zachariah Turner, Odin A. Olsen, Robert L. Barbee and Thomas B. Forsyth.

III.

The court erred in finding that Section Thirty-four (34), Township Twenty-two (22), North of Range Seven (7), East of the Willamette Meridian, was known coal land at or prior to the date of the purchase of said section by the defendant above named.

IV.

The court erred in finding that the East half (E½) of the East half (E½) of Section Thirty-four (34), Township Twenty-two (22), North of Range Seven (7) East of the Willamette Meridian, was known coal land at and prior to the date of the homestead entry thereon of Zachariah Turner.

V.

The Court erred in finding that the Northwest quarter (NW¼) of Section Thirty-four (34), Township Twenty-two (22), North of Range Seven (7), East of the Willamette Meridian, was known coal land at and prior to the date of the homestead entry thereon of Odin A. Olsen.

VI.

The Court erred in finding that the Southwest quarter (SW ¼), of Section Thirty-four (34), Township Twenty-two (22), North of Range Seven (7), East of the Willamette Meridian, was known coal land at and prior to the date of the homestead entry thereon of Robert L. Barbee.

VII.

The court erred in finding that the West half (W-½) of the Northeast quarter (NE-¼) and the West half (W-½) of the Southeast quarter (SE¼)of Section Thirty-four (34), Township Twenty-two (22), North of Range Seven (7), East of the Willamette Meridian, was known coal land at and prior to the date of the homestead entry thereon of Thomas B. Forsyth.

VIII.

The court erred in finding that the East half (E½) of the East half (E-½) of Section Thirty-four (34), Township Twenty-two (22), North of Range Seven (7), East of the Willamette Meridian, was known coal land at and prior to the second day of November, 1904.

IX.

The court erred in finding that the Northwest quarter (NW-¼) of Section Thirty-four (34), Township Twenty-two (22),

North of Range Seven (7), East of the Willamette Meridian, was known coal land at and prior to the first day of November, 1904.

X.

The Court erred in finding that the Southwest quarter (SW-¼) of Section Thirty-four (34), Township Twenty-two (22), North of Range Seven (7), East of the Willamette Meridian, was known coal land at and prior to the twelfth day of December, 1904.

XI.

The court erred in finding that the West half (W-½) of the Northeast quarter (NE-¼) and the West half (W-½) of the Southeast quarter (SE-¼) of Section Thirty-four (34), Township Twenty-two (22), North of Range Seven (7), East of the Willamette Meridian, was known coal land at and prior to the third day of August, 1907.

XII.

The Court erred in finding that the several patentees entered into possession of said section Thirty-four (34), Township Twenty-two (22), North of Range Seven (7), East of the Willamette Meridian and excluded therefrom the "coal syndicate" by force and threats of violence.

XIII.

The court erred in finding that there was no formal contest between the "syndicate" and the patentees, and that the land office, without permitting the introduction of evidence, arbitrarily rejected the coal claim and that no appeal was taken.

XIV.

The court erred in finding that the defendant, at the time of purchasing the land, had actual knowledge that when the commutation entries were allowed the land was known to be coal land and should have been sold as coal land only, to purchasers authorized by law to make entry of coal land in limited quantities as prescribed by law, and knew that the officers of

the land office had, contrary to their duty, allowed the entries and issued patents as if the land were rightfully classed as non-mineral land, and with that knowledge purchased the land from patentees, paying therefor what appeared to be a fair price for undeveloped coal land.

XV.

The court erred in finding that the defendant was not a *bona fide* purchaser of Section thirty-four (34), Township Twenty-two (22), North of Range Seven (7), East of the Willamette Meridian, but acquired it with knowledge of the facts tainting the title.

XVI.

The court erred in decreeing that the patents to Section Thirty-four (34), Township Twenty-two (22), North of Range Seven (7), East of the Willamette Meridian, be cancelled, annulled and set aside, and that the defendant and all persons claiming under it be foreclosed of all interest, right or title to said section, and that the complainant is the legal and equitable owner of said lands and confirming and quieting its title thereto.

XVII.

The court erred in not entering a decree dismissing complainant's complaint.

XVIII.

The court erred in taxing the costs of this action against the defendant and in not taxing the costs thereof against the complainant.

CHARLES P. SPOONER,
H. R. CLISE,
Solicitors for Defendant.

Endorsed: Assignment of Errors. Filed U. S. Circuit Court, Western District of Washington, Feb. 27, 1911, Sam'l. D. Bridges, Clerk, W. D. Covington, Deputy.

United States Circuit Court, Western District of Washington, Northern Division.

UNITED STATES OF AMERICA, *Complainant,* vs. WASHINGTON SECURITIES COMPANY, a corporation, *Defendant.*	No. 1706. Order Fixing Amount of Cost Bond.

This cause coming on for hearing upon the application of complainant to have the Court fix the amount of the cost bond, and the Court being duly advised in the premises:

It is Hereby Ordered and Decreed that the amount of the cost bond of the defendant on appeal herein be and hereby is fixed at the sum of Two Hundred and Fifty Dollars ($250), which shall be for costs only and shall not operate as a supersedeas bond.

Done in open Court this 2nd day of March, A. D. 1911.

C. H. HANFORD,
United States District Judge, presiding in the above named Court.

Service of copy of the foregoing order is hereby admitted this 2d day of March, A. D. 1911.

ELMER E. TODD,
Solicitor for Complainant.

Endorsed: Order fixing amount of Cost Bond. Filed U. S. Circuit Court, Western District of Washington, Mar. 2, 1911, Sam'l. D. Bridges, Clerk, W. D. Covington, Deputy.

United States Circuit Court, Western District of Washington, Northern Division.

UNITED STATES OF AMERICA,
Complainant,
vs.
WASHINGTON SECURITIES COMPANY, a corporation,
Defendant.

No. 1706.
Bond on Appeal.

Know All Men by these Presents: That we, Washington Securities Company, as principal, and J. W. Clise and C. J. Smith, as sureties, are held and firmly bound unto the United States of America, complainant and appellee, in the sum of Two Hundred and Fifty Dollars ($250.00), for the payment of which sum, well and truly to be made, we jointly and severally bind ourselves, our heirs, personal representatives and assigns, firmly by these presents.

Sealed with our seals and dated this sixth (6) day of March, A. D. 1911.

The Condition of this Obligation is Such that Whereas, in the above entitled Court and action an order and decree was entered on the 25th day of February, A. D. 1911, in accordance with the prayer of the complaint, and the said Washington Securities Company having obtained from said Court an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the said decree, and a citation directed to the President of the United States is about to be issued, citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, California;

Now the Condition of the above Obligation is such that,

If the said Washington Securities Company shall prosecute its said appeal to effect and answer all costs that may be awarded against it, if it fails to make its plea good, then the

above obligation to be void; otherwise to remain in full force and virtue.

(Seal) WASHINGTON SECURITIES COMPANY
By J. W. Clise, (Seal)
Its President.
and L. S. Brockway, (Seal)
Its Secretary.
J. W. CLISE (Seal)
C. J. SMITH (Seal)

United States of America,
Western District of Washington.—ss

J. W. Clise and C. J. Smith being first duly sworn, each for himself deposes and says:

That he is a resident and a householder and freeholder within said Western District of Washington, and that he is worth the amount specified in the foregoing bond over and above all his debts and liabilities, exclusive of property exempt from execution.

J. W. CLISE,
C. J. SMITH.

Subscribed and sworn to before me this 6th day of March, A. D. 1911.

(Seal) H. R. CLISE.
Notary Public in and for the State of Washington, residing at Seattle.

The foregoing bond is hereby approved by me this 8th day of March, A. D. 1911.

C. H. HANFORD,
United States District Judge, presiding in the above named Circuit Court.

Service of the foregoing bond upon the said complainant this 7th day of March, A. D. 1911, is hereby acknowledged.

ELMER E. TODD,
Solicitor for Complainant.

Endorsed: Bond on Appeal. Filed U. S. Circuit Court, Western District of Washington, Mar. 8, 1911, Sam'l. D. Bridges, Clerk, W. D. Covington, Deputy.

United States Circuit Court, Western District of Washington, Northern Division.

WASHINGTON SECURITIES COMPANY, a corporation, *Defendant and Appellant,* vs. UNITED STATES OF AMERICA, *Complainant and Appellee.*	No. 1706. Citation on Appeal.

United States of America—ss.
The President of the United States

To United States of America and Elmer E. Todd, United States Attorney, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to an appeal filed in the Clerk's office at the Circuit Court of the United States for the Western District of Washington, Northern Division, wherein the Washington Securities Company, a corporation, is appellant, and you, the said United States of America and Elmer E. Todd, United States Attorney, are appellees, to show cause, if any there be, why the decree in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States of America, this 2d day of March, A. D. 1911, and of the independence of the United States the one hundred and thirty-fifty year.

C. H. HANFORD,
United States District Judge for the Western District of Washington, presiding in the Circuit Court.

(Seal)

SAM'L. D. BRIDGES,
Clerk of the United States Circuit Court for the Western District of Washington, Northern Division.

By W. D. COVINGTON,
Deputy.

Service of the foregoing citation upon said appellee this 2nd day of March, A. D. 1911, is hereby acknowledged.

ELMER E. TODD,
Solicitor for said United States of America, *Appellee.*

Endorsed: Citation on Appeal. Filed U. S. Circuit Court, Western District of Washington, Mar. 2, 1911, Sam'l. D. Bridges, Clerk, W. D. Covington, Deputy.

United States Circuit Court, Western District of Washington, Northern Division.

UNITED STATES OF AMERICA, *Complainant,* vs. WASHINGTON SECURITIES COMPANY, a corporation, *Defendant.*	No. 1706. Praecipe for Record on Appeal.

To the Clerk of the Above Named Court:

You will please forwith prepare, certify and transmit to the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, a record on the pending appeal of the defendant, Washington Securities Company, from the decree lately entered in favor of the complainant in the above entitled cause, on the 25th day of February, 1911, which record shall consist of the following files, records and proceedings in said cause, to-wit:

Complainant's Bill of Complaint.

Answer of Defendant.

Replication.

All proofs, including testimony taken before the Master, with all exhibits and depositions.

Memorandum Opinion on the Merits.

Decree, filed the 25th day of February, 1911.

Petition of Defendant for allowance of appeal from said decree, together with the Allowance of said Appeal, filed the 2nd day of March, 1911.

Assignment of Errors, filed the 27th day of February, 1911.

Order fixing amount of Cost Bond, filed the 2nd. day of March, 1911.

Cost Bond on Appeal, filed the 8th day of March, 1911.

Citation (Original) returned and filed the 2d day of March, 1911.

Praecipe for Record on Appeal, filed the 2d day of March, 1911.

C. P. SPOONER,
H. R. CLISE,
Solicitors for Defendant and Appellant.

Contents of the above praecipe contains a complete record of all proceedings in the above cause necessary for hearing on appeal.

C. P. SPOONER,
H. R. CLISE,
Solicitors for Defendant and Appellant.

Endorsed: Praecipe for Record on Appeal. Filed U. S. Circuit Court, Western District of Washington, Mar. 2, 1911, Sam'l. D. Bridges, Clerk, W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA,
Complainant and Appellee,
vs.
WASHINGTON SECURITIES COMPANY, a corporation,
Defendant and Appellant.

No. 1706.

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington.—ss.

I, Sam'l. D. Bridges, Clerk of the Circuit Court of the United States, for the Western District of Washington, do hereby

certify the foregoing two hundred seventy-nine printed pages, numbered from 1 to 279, inclusive, to be a full, true and correct copy of the record and proceedings, in the above and foregoing entitled cause, as the same remain of record and on file in the office of the Clerk of the said Court, and that the same constitutes the record on appeal from the order, judgment and decree of the Circuit Court of the United States, for the Western District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit.

I further certify that I hereto attach and herewith transmit the original Citation issued in this cause.

I further certify that the cost of preparing and certifying the foregoing record on appeal is the sum of $475.70, and that the said sum has been paid to me by C. P. Spooner and H. R. Clise, solicitors for Defendant and Appellant.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Circuit Court at Seattle, in said District, this 22nd day of April, 1911.

SAM'L. D. BRIDGES, Clerk,
By W. D. COVINGTON,
Deputy Clerk.

(Seal)

United States Circuit Court, Western District of Washington, Northern Division.

WASHINGTON SECURITIES COMPANY, a corporation, *Defendant and Appellant,* vs. UNITED STATES OF AMERICA, *Complainant and Appellee.*	No. 1706. Citation on Appeal.

UNITED STATES OF AMERICA—ss.

The President of the United States to United States of America and Elmer E. Todd, United States Attorney, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to an appeal filed in the Clerk's office at the Circuit Court of the United States for the Western District of Washington, Northern Division, wherein the Washington Securities Company, a corporation, is appellant, and you, the said United States of America and Elmer E. Todd, United States Attorney, are appellees, to show cause, if any there be, why the decree in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States of America, this 2d day of March, A. D. 1911, and of the independence of the United States the one hundred and thirty-fifth year.

C. H. HANFORD,
United States District Judge for the Western District of Washington, Presiding in the Circuit Court.

(Seal)

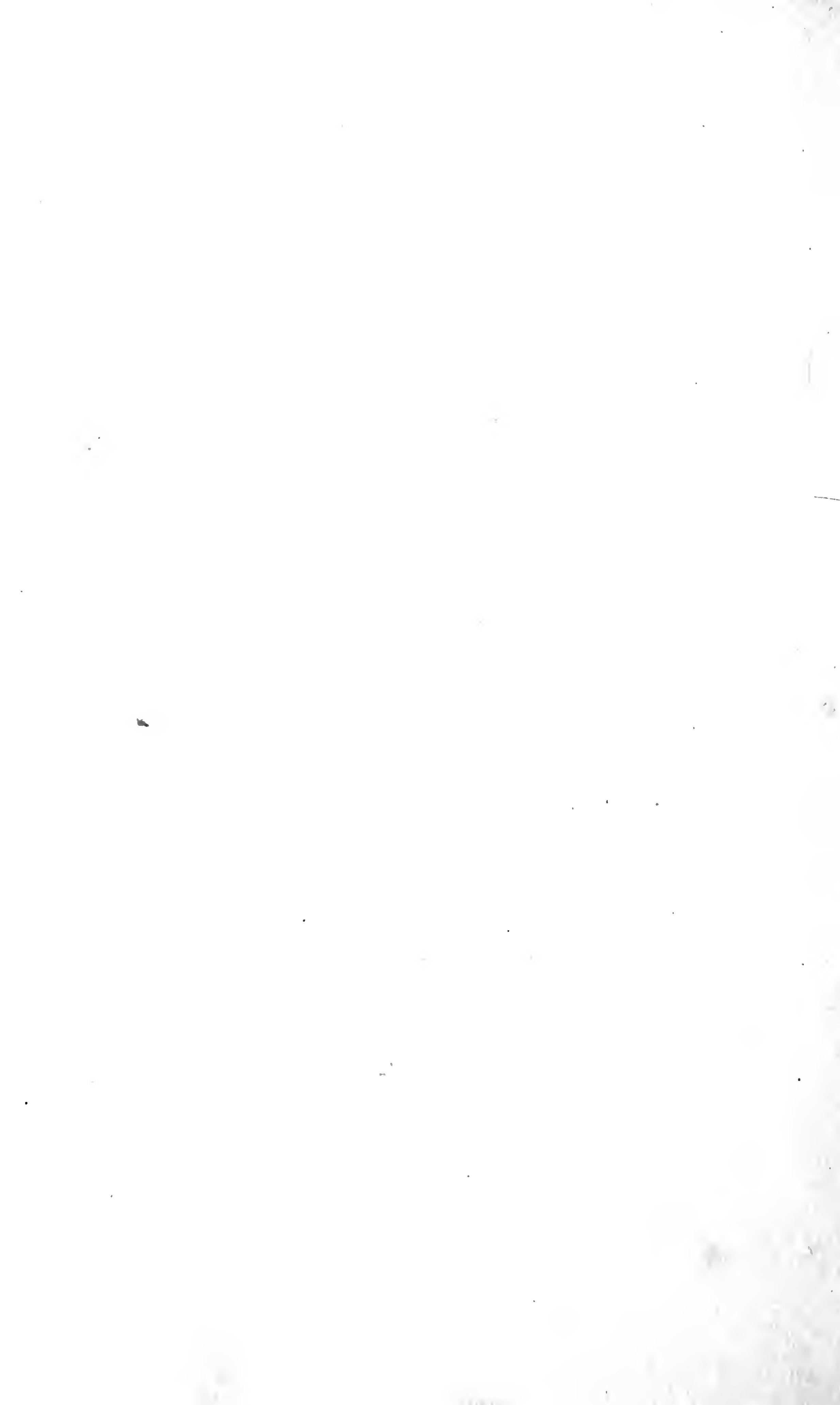
SAM'L D. BRIDGES,
Clerk of the United States Circuit Court for the Western District of Washington, Northern Division.

By W. D. COVINGTON,
Deputy.

Service of the foregoing citation upon said appellee this 2d day of March, A. D. 1911, is hereby acknowledged.

ELMER E. TODD,
Solicitor for said United States of America, Appellee.

Endorsed: Citation on Appeal. Filed U. S. Circuit Court, Western District of Washington, March 2, 1911, Sam'l D. Bridges, Clerk, W. D. Covington, Deputy.



No. 1988

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WASHINGTON SECURITIES COMPANY, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANT

Appeal from the United States Circuit Court, for the Western District of Washington, Northern Division.

CHAS. P. SPOONER
H. R. CLISE
C. K. POE
Attorneys for Appellant.

610 New York Block,
Seattle, Washington.

THE HODSON PRINTING CO., SEATTLE

FILED
SEP - 5 1911

No. ....

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WASHINGTON SECURITIES COMPANY, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANT

Appeal from the United States Circuit Court, for the Western District of Washington, Northern Division.

STATEMENT.

Appeal from a decree of the Circuit Court cancelling certain patents.

This suit is prosecuted by the Government, by bill in equity, to cancel four homestead patents issued for different tracts of land now owned by appellant

and conveyed by the several patentees to C. J. Smith, who in turn transferred the same to appellant.

The land involved is the whole of Section 34, Township 22 North of Range 7 East W. M. The patents each conveyed 160 acres, and were issued at different times to the several patentees as follows:

To Zachariah Turner, patent dated November 2, 1904, to E. ½ of E. ½ of said section.

To Odin A. Olsen, patent dated May 6, 1903, to N. W. ¼ of said section.

To Robert L. Barbee, patent dated December 12, 1904, to S. W. ¼ of said section.

To Thos. B. Forsyth, patent dated August 3, 1904, to W. ½ of N. E. ¼ and W. ½ of S. E. ¼ of said section.

Odin A. Olsen conveyed an undivided one-half interest in his quarter section to Thos. G. Spraight on February 24, 1905, and they both thereafter, on February 24, 1906, conveyed the whole to C. J. Smith.

Thos. B. Forsyth conveyed his quarter to C. J. Smith on May 4, 1906, and Turner and Barbee conveyed theirs to him on October 10, 1906.

Smith in turn conveyed the various quarters to appellant, the Turner, Olsen and Barbee tracts on October 10, 1906, and the Forsyth on May 14, 1906.

While the trial court has treated the whole section jointly, we prefer to discuss the several quarters separately as the facts relating to each allotment are somewhat different. For instance, there is no testimony to show that there is any coal on the Turner claim (E. 1/2 of E. 1/2), while there is considerable regarding the western part of the section.

The theory upon which the Government sues is that the lands involved were known coal lands, and that the several patentees homesteaded them as agricultural and timber lands, knowing that they were neither the one nor the other, but in fact containing valuable deposits of coal; that in swearing to the non-mineral affidavit required by lay they perpetrated a fraud upon the Government which vitiates these patents, and authorizes their cancellation, even as against appellant.

There is no pretext or effort to charge the officials of the Department with complicity in the alleged fraud, but it is sought to connect appellant therewith by alleging knowledge of all the circumstances when they bought from the several patentees.

The chain of circumstances by which this is sought to be accomplished is certainly slender and we will give it in detail, viz.:

In 1882 F. H. Whitworth, E. M. Smithers, Al. Evans, three other men and an Indian were prospecting upon this land (Record 104). Shortly thereafter a syndicate was formed of E. M. Smithers, J. M. Colman, James Williams and Mr. Whitworth. About that time Mr. Howard, a representative of the Oregon Improvement Company, became interested in the prospect (Record 106). Subsequently Mr. Howard, ostensibly as an individual, but in reality as the trustee of the Oregon Improvement Company, acquired a one-third interest in the prospect. Some time thereafter C. J. Smith became the receiver of the Oregon Improvement Company, and continued as such "from 1891 to 1898." (Record 132.)

On November 8, 1890, Mr. Howard wrote him in regard to this land and stated among other things that he had received conflicting reports, "some favorable, some otherwise." (Record 240.) This letter was followed by another dated December 8, 1890, in which he asked Mr. Smith to have the land examined. He says that "here is an expense of the company's which was incurred prior to the appointment of the receiver." (Complainant's Ex. "G," Record 241.) This last letter evidently prompted complainant's Exhibit "H," (Record 242), which is as follows:

"Seattle, Washington, Dec. 9, 1890.

H. W. McNeill, Esq.,
Seattle, Wash.

Dear Sir:—

Please let me know what you think of Section 34 marked on the map in the name of J. H. Howard. Is there anything in it, or have you ever made any examination of it?

C. J. SMITH, General Manager."

So far the record not only fails to show that appellant knew that the section was coal land, but conclusively establishes the fact that Mr. Smith, up to the time, knew nothing about it. Let us then see if there is anything else which will establish such knowledge.

The letter last quoted is followed by one from Whitworth to Mr. Howard, wherein he offers to sell his own and a Mr. McGuire's interest, and enclosed a bill for expense in connection with the land for two years preceding. (Complainant's Ex. "I," Record 242.) This bill charges Mr. Howard with $51.50 of the total expense. The next instrument is an Oregon Improvement Company voucher for the amount of this charge, approved by "C. J. Smith, Receiver and General Manager." (Complainant's Ex. "J," Record 244.) This voucher is dated December, 1896.

Upon the organization of the appellant company Mr. Smith became one of its directors and its vice president.

This is absolutely every word contained in the record showing or tending to show that Mr. Smith, the appellant, its agents or any one immediately or remotely connected with it, knew anything about the land until after the patents were issued, or until the Washington Securities Company was about to be formed. This was ten years after the voucher last mentioned. (Record 132.)

At the time the appellant was about to be organized, a Mr. Braggs (or *Brooks*) called on Mr. Smith and offered him the land as a coal proposition. Mr. Smith said he was not interested, and "referred him to C. R. Collins, who at that time was hunting for some coal land with the expectation of getting coal that was adaptable for gas purposes." (Record 134.) Collins could not raise the necessary money and Braggs (or *Brooks*) came back to Mr. Smith. "In the meantime the Washington Securities Company was about to be formed" and he "referred Mr. Braggs (or *Brooks*) to the Securities Company."

"He had a talk with Mr. Clise, who expected to be president of the company and who was promoting

it—forming it, and Mr. Clise discussed the question with me (Mr. Smith) and Mr. Braggs (or *Brooks),* and I (he) told him that—I (he) gave him the name of an engineer—mining engineer, that would exploit the land, that is, would make an examination, and that I knew nothing personally about the land myself, but would rely upon a report that this man would make; and, at my suggestion, the man was employed to go there, and look over the land."

"After he had looked it over the matter of purchase was taken up between myself (Mr. Smith) and Mr. Braggs (or *Brooks)* and an option was taken for a sufficient length of time to enable us to verify the report of the engineer, and, upon the verification of those reports and the abstract of title, the land was purchased" (Record 134). This abstract was examined by H. R. Clise, appellant's attorney.

In addition to this the record shows that the Land Office officials knew of these various prospects and "expired coal declaratory statements on the land" (Record 236), and also that one of complainant's witnesses, Sidney J. Williams, after the homesteaders had filed, made a tender of $3,200 to the Land Office (Record 71), talked about coal being there, had witnesses to prove it and that as a result

of that showing the Land Office returned his money and rejected his filing. This was about 1897.

We wish to impress upon your honors that the Land Office is not charged with fraud or connivance with appellant or the homesteaders, and it follows that a finding of fact by them is conclusive under the issues. Certainly one purchasing land which has been conveyed by patent is entitled to assume that its issuance was authorized and to believe that the government's agents performed their duty.

Before proceeding with the argument we wish to briefly summarize the facts in an effort to discover any guilty knowledge imputable to the Washington Securities Company and sufficient to warrant the cancellation of these patents, even if it be assumed that their cancellation would be warranted had the government succeeded in establishing the allegations of its bill.

We have two letters written to Mr. Smith nearly sixteen years ago, telling him that the company, for which he was then receiver, had a one-third interest in a prospecting venture upon the land in suit, and asking him to find out something about it. Next we have a letter written by Mr. Smith at about the same time to Mr. McNeill, asking his opinion of the land.

This is followed by an offer of the chief witness, Mr. F. W. Whitworth, to sell his interest in the land, and then comes a voucher, approved by Mr. Smith as receiver of the Oregon Improvement Company, for $51.50 in payment of some charges connected with the prospecting adventure. None of these things show that he remembered the circumstances after a lapse of nearly sixteen years, and it is certainly more reasonable to say (especially in view of his testimony quoted) that he had forgotten them than that he remembered them.

His letter to Mr. McNeill is proof positive that he knew nothing about the land at the time it was written, and Mr. Whitworth's offer to sell tends strongly to establish the fact that he thought but little of the land as a mining proposition.

Add to this the fact that none of the prospectors during all of the years they worked upon the land thought it sufficiently valuable to justify them in entering upon it as a mining claim, and one is convinced that the Land Office was warranted in permitting the patentees to homestead it and to reach the conclusion that it was more valuable for agricultural than as mining land.

Mr. C. J. Smith is the medium through whom the appellant Securities Company is sought to be charged

with fraud, and unless it can be established by clear, unequivocal and convincing testimony that he was guilty of fraud and had knowledge of the character of the land in question at the time the patents were issued, and that he also brought this knowledge home to appellant, the action must fall and the decree of the trial court be reversed. This for the reason that there is not one word of testimony in the case establishing or attempting to establish that appellant was guilty of misconduct except such as might be imputed by reason of its relations with Mr. Smith. The record utterly fails to show either:

(1) That Mr. Smith connived with or assisted the patentees in homesteading the land, or that he even knew that they owned it until Mr. Braggs (or *Brooks)* called on him.

(2) That he ever knew the source or character of their title or whether they entered upon the land under the mining or homestead laws. On the contrary, it shows that Mr. H. R. Clise examined the title, found it apparently perfect and so reported to appellant and to Mr. Smith.

(3) That Mr. Smith recalled the circumstances which were brought to his knowledge some sixteen years before while acting as receiver of the Oregon Improvement Company.

(4) That even if he had this knowledge, that he ever communicated it to the appellant company.

(5) That the appellant was not a *bona fide* purchaser for value and as such entitled to rely upon the validity of the patents.

(6) That the department officials were not warranted in making the finding which they did relative to the character of the land, and that the government did not have full knowledge of the exact character of this land.

(7) That appellant was not entitled to rely upon the sufficiency and finality of that finding.

Upon these facts the honorable Circuit Court, for the reasons set forth in his written opinion (Record 261), entered a decree cancelling the patents and restoring the land to the government.

ASSIGNMENT OF ERRORS.

I.

The court erred in finding that Section thirty-four (34), Township twenty-two (22) North of Range seven (7) East of the Willamette Meridian, was known coal land at or prior to the date of the the homestead entries of Zachariah Turner, Odin A. Olsen, Robert L. Barbee and Thomas B. Forsyth.

II.

The court erred in finding that Section thirty-four (34), Township twenty-two (22) North of Range seven (7) East of the Willamette Meridian, was known coal land at the dates of the issuance

of patents to said Zachariah Turner, Odin A. Olsen, Robert L. Barbee and Thomas B. Forsyth.

III.

The court erred in finding that Section thirty-four (34), Township twenty-two (22) North of Range seven (7) East of the Willamette Meridian, was known coal land at and prior to the date of purchase of said section by the defendant above named.

IV.

The court erred in finding that the East half (E.½) of the East half (E. ½) of Section thirty-four (34), Township twenty-two (22) North of Range seven (7) East of the Willamette Meridian, was known coal land at and prior to the date of the homestead entry thereon by Zachariah Turner.

V.

The court erred in finding that the Northwest quarter (N. W. ¼) of Section thirty-four (34), Township twenty-two (22) North of Range seven (7) East of the Willamette Meridian, was known coal land at and prior to the date of the homestead entry thereon of Odin A. Olsen.

VI.

The court erred in finding that the Southwest quarter (S. W. ¼) of Section thirty-four (34),

Township twenty-two (22) North of Range seven (7) East of the Willamette Meridian, was known coal land at and prior to the dates of the homestead entry thereon of Robert L. Barbee.

VII.

The court erred in finding that the West half (W. ½) of the Northeast quarter (N. E. ¼) and the West half (W. ½) of the Southeast quarter (S. E. ¼) of Section thirty-four (34), Township twenty-two (22) North of Range seven (7) East of the Willamette Meridian, was known coal land at and prior to the date of the homestead entry thereon of Thomas B. Forsyth.

VIII.

The court erred in finding that the East half (E. ½) of the East half (E. ½) of Section thirty-four (34), Township twenty-two (22) North of Range seven (7) East of the Willamette Meridian, was known coal land at and prior to the second day of November, 1904.

IX.

The court erred in finding that the Northwest quarter (N. W. ¼) of Section thirty-four (34), Township twenty-two (22) North of Range seven (7) East of the Willamette Meridian, was known coal land at and prior to the first day of November, 1904.

X.

The court erred in finding that the Southwest quarter (S. W. 1/4) of Section thirt-four (34), Township twenty-two (22) North of Range seven (7) East of the Willamette Meridian, was known coal land at and prior to the twelfth day of December, 1904.

XI.

The court erred in finding that the West half (W. 1/2) of the Northeast quarter (N. E. 1/4) and the West half (W. 1/2) of the Southeast quarter (S. E. 1/4) of Section thirty-four (34), Township twenty-two (22) North of Range seven (7) East of the Willamette Meridian, was known coal land at and prior to the third day of August, 1907.

XII.

The court erred in finding that the several patentees entered into possession of said Section thirty-four (34), Township twenty-two (22) North of Range seven (7) East of the Willamette Meridian, and excluded therefrom the "coal syndicate" by force and threats of violence.

XIII.

The court erred in finding that there was no formal contest between the "syndicate" and the patentees, and that the land office, without permitting

the introduction of evidence, arbitrarily rejected the coal claim and that no appeal was taken.

XIV.

The court erred in finding that the defendant, at the time of purchasing the land, had actual knowledge that when the commutation entries were allowed the land was known to be coal land and should have been sold as coal land only, to purchasers authorized by law to make entry of coal land in limited quantities as prescribed by law, and knew that the officers of the land office had, contrary to their duty, allowed the entries and issued patents as if the land were rightfully classed as non-mineral land, and with that knowledge purchased the land from patentees, paying therefor what appeared to be a fair price for undeveloped coal land.

XV.

The court erred in finding that the defendant was not a *bona fide* purchaser of Section thirty-four (34), Township twenty-two (22) North of Range seven (7) East of the Willamette Meridian, but acquired it with knowledge of the facts tainting the title.

XVI.

The court erred in decreeing that the patents to Section thirty-four (34), Township twenty-two (22)

North of Range seven (7) East of the Willamette Meridian, be cancelled, annulled and set aside, and that the defendant and all persons claiming under it be foreclosed of all interest, right or title to said section, and that the complainant is the legal and equitable owner of said lands and confirming and quieting its title thereto.

XVII.

The court erred in not entering a decree dismissing complainant's complaint.

XVIII.

The court erred in taxing the costs of this action against the defendant and in not taxing the costs thereof against the complainant.

POINTS AND AUTHORITIES.

I.

Knowledge acquired by an officer of a corporation some sixteen years before its organization, and while he was in the employ of another concern, is certainly not chargeable to such corporation, unless it be clearly shown that such knowledge was actually communicated.

Breman vs. Emery-Bird, etc., Co., 99 Fed. 971.

Davis, etc., Co. vs. Davis Imp. Wrought Iron Wagon Co., 20 Fed. 699.

Houseman vs. Gerard Mutual Assn. 81 Pa. St. 256 (opinion by Sharswood, J.).

Story on Agency, Sec. 140.

II.

Such knowledge will not be imputed from slight proof that the agent might have acquired some information at a remote period.

Harrington vs. U. S., 11 Wall. 356 (20 L. Ed. 167).

III.

Whether such knowledge is ever chargeable to the principal depends upon: (1) Whether "it is present to the agent's mind at the time of effecting the purchase." (2) "Clear and satisfactory proof that it was so present." (3) Time within which it was acquired, and the presumption of this knowledge will depend upon lapse of time.

Harrington vs. U. S., supra.

IV.

"We take the general doctrine to be that, when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done *must be clear, unequivocal and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt.* If the proposition, as thus laid down in the cases cited, is sound in regard to the

ordinary contracts of private individuals, *how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidence of title emanating from the government of the United States under its official seal.*"

> *Maxwell Land Grant Case*, 121 U. S. 325, 381 (30 L. Ed. 949).
>
> *United States vs. Iron Silver Mining Co.*, 128 U. S. 673, 674 (32 L. Ed. 571).
>
> *Colorado Coal & Iron Co. vs. United States*, 123 U. S. 307 (31 L. Ed. 182).
>
> *United States vs. Stinson*, 197 U. S. 200, 204 (49 L. Ed. 724).
>
> *United States vs. Clark*, 200 U. S. 601 (50 L. Ed. 613).

V.

To a bill in equity to cancel a patent on the ground of fraud or mistake the defense of *bona fide* purchaser for value is perfect.

> *Colorado Coal & Iron Co. vs. U. S.*, 123 U. S. 307, 313 (31 L. Ed. 182).
>
> *United States vs. Stinson*, 197 U. S. 200, 205 (49 L. Ed. 724).
>
> *United States vs. Winona, etc., R. R. Co.*, 165 U. S. 463, 478, 479 (41 L. Ed. 789).

United States vs. Detroit Lumber Co., 200 U. S. 321 (50 L. Ed. 499).

VI.

The defendant had a right to rely on the patent. It was not necessary for Mr. Smith to make a personal examination of the land.

United States vs. California, etc., Land Co., 148 U. S. 31, 44, 45 (37 L. Ed. 354).

VII.

Land must be *known* to be minerally valuable as required by law *at the date of patent.*

Deffeback vs. Hawke, 115 U. S. 392, 404, 405 (29 L. Ed. 423).

Davis, Admr., vs. Weibold, 139 U. S. 507, 521, 524 (35 L. Ed. 238).

Dower vs. Richards, 151 U. S. 658, 663 (38 L. Ed. 315).

Colorado Coal & Iron Co. vs. U. S., 123 U. S. 307, 327 (31 L. Ed. 182).

The rule is less liberal in favor of the mineral character of land where the contest is between an agricultural claimant and a mineral claimant than where it is between two mineral claimants.

Chrisman vs. Miller, 197 U. S. 313, 323 (49 L. Ed. 770).

"It is established by former decisions of this court that, under the acts of congress which govern this case, in order to except mines or mineral lands from the operation of a townsite patent, it is not sufficient that the lands do in fact *contain minerals, or even valuable mineral,* when the townsite patent takes effect; but they must at that time be known to contain minerals of such extent *and value as to justify expenditures for the purpose of extracting them;* and, if the lands are not known at that time to be so valuable for mining purposes, the fact that they have once been valuable, or are afterwards discovered to be still valuable for such purpose, does not defeat or impair the title of persons claiming under the townsite patent."

Dower vs. Richards, 151 U. S. 658, 663 (38 L. Ed. 305).

Deffeback vs. Hawke, 115 U. S. 392 (29 L. Ed. 423).

Davis vs. Weibold, 139 U. S. 507 (35 L. Ed. 238).

Not only is the foregoing true, but the Supreme Court in the case of *Davis vs. Weibold* says, on page 522:

"Nor is it sufficient that the mineral claimant shows that the land is of little agricultural value. He must show affirmatively, in order to establish his claim, that the mineral value of the land is greater than its agricultural value."

And on pages 523 and 524:

"If mineral patent will not be issued unless the minerals exist in sufficient quantity to render the land more valuable for mining than for other purposes, *which can only be known by development and exploration,* it should follow that the land may be patented for other purposes if that fact does appear."

There must be knowledge, not mere belief, of the mineral character of the land.

Iron Silver Mining Co. vs. Reynolds, 124 U. S. 374, 383, 384 (318 L. Ed. 466).

Whether the homesteaders (who are appellant's grantors) or the mineral claimants were entitled to patents was in dispute before the department, and the question determined adversely to the contention of the mineral claimants. A material fact in this controversy was the nature of the land, and the finding of the department on that point is conclusive upon the courts. Especially in a case like this where there is no charge of fraud on the part of the department officials, or attempt to connect Mr. Smith or appellant in the proceedings before the land office.

"The appropriate officers of the land department have been constituted a special tribunal to decide such questions, and their decisions are final to the

same extent that those of other judicial tribunals are."

Vance vs. Burbank, 122 Otto 514 (25 L. Ed. 929).

And even if we assume that the homesteaders practiced a deceit upon the government, the effect of the department's finding is not altered, for

"False testimony or forged documents even are not enough if the *disputed matter has been actually presented to or considered* by the appropriate tribunal. *United States vs. Throckmorton.*"

Vance vs. Burbank (supra).

"The decision of the proper officers of the department is in the nature of a judicial determination of the matter in dispute."

Vance vs. Burbank (supra).

Greenameyer vs. Coate, 212 U. S. 434 (53 L. Ed. 587).

Quinby vs. Conlan, 14 Otto 420 (26 L. Ed. 800).

"But it is well settled that the decision of the Land Department upon questions of fact is conclusive in the courts. *Burfenning vs. Chicago, St. P., M. & O. R. Co.,* 163 U. S. 321, 323, 41 L. Ed. 175, 176, 16 Sup. Ct. Rep. 1018, and cases cited; *Johnson vs.*

Drew, 171 U. S. 362, 45 L. Ed. 574, 21 Sup. Ct. Rep. 399.

"It is hardly necessary to say that when a decision has been made by the secretary of the interior, courts will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided, or as to the methods by which he reached his determination."

DeCambra vs. Rogers, 189 U. S. 119 (47 L. Ed. 734).

ARGUMENT.

It will be remembered that the gist of this action is fraud committed by the appellant. It will not suffice to show that the homesteaders committed fraud (and even this was not established), but the appellant must be positively and conclusively shown to have participated. As no one associated with appellant, except Mr. Smith, is even claimed to have known anything about the land before patent, his acts and knowledge are the only possible grounds upon which the decree could be based. And even what he did or knew is not imputable to appellant unless it be shown to have sanctioned or acted with knowledge thereof.

What Mr. Smith knew sixteen years ago while acting as receiver of the Oregon Improvement Com-

pany cannot affect appellant, for the elementary reason that a corporation not in being or even contemplation cannot be charged with knowledge acquired by an individual some sixteen years before its organization. Aside from this the facts do not show that Mr. Smith knew anything about the land until after the patents were issued, and then only when it was brought to his attention by Mr. Brooks. (Record, p. 156.)

To the contrary, all his letters introduced in evidence and set out in our statement of the case show that he was ignorant of the character of the land, and it is a significant fact that the government did not show that he ever received any response to his request for information concerning it.

The record absolutely fails to show that Mr. Smith ever had any personal knowledge of the character of the land before patent. To the contrary, it shows that his predecessor in the Oregon Improvement Company, Mr. Howard, had personally carried on all negotiations in regard thereto, and that all Mr. Smith did, to use his own words, was to assent to *"the toleration of that which already existed."* (Record 159.)

We can conceive of no better way to disabuse the mind of the thought of fraud on the part of both Mr. Smith and the company than by quoting his entire testimony on the subject of his knowledge of the character of the land, as the same appears at pages 155 to 164, inclusive:

"Q. (Mr. Spooner) Mr. Smith, I would like to ask you, as far as you can recollect, what is the first date, or substantially the first date, you ever heard of this section that is involved in this litigation?

A. Either in the latter part of 1890 or the beginning of 1891, I do not remember which.

Q. At that time you were with the Oregon Improvement Company?

A. Yes, sir.

Q. What was the date of your purchase of this section for the Washington Securities Company?

A. I think it was in 1906.

Q. I would like to ask you what knowledge, if any, you had during the time you were connected with the Oregon Improvement Company of the character of this section?

A. I had no personal knowledge whatever.

Q. I would like to ask you whether or not at the time, between the time you left the Oregon Improvement Company and the time you were first approached upon the subject of buying this section, whether or not you had acquired any information as to the character of this section?

A. I had not.

Q. I believe you testified when Mr. Todd had you on the stand, if I am not mistaken, the circumstances under which you bought it; that is, as I remember it, you spoke of and detailed your being approached by a man who represented these homesteaders, didn't you?

A. Yes, sir, Mr. Brooks.

Q. Up to the time you were approached by the representative of these homesteaders with the view of selling this land, I would like to ask you whether or not you knew that it had been taken up as a homestead or in any other way?

A. I did not.

Q. About how long before the actual purchase was made by you were you first approached about it?

A. I should say six months—three months probably. Mr. Brooks came to me and stated he had an option, and wanted me to interest myself in the matter, and I refused at that time to do; I declined to take any interest in it, but I directed him to Mr. Collins who had been looking for coal lands. He had some talk with Mr. Collins. Mr. Collins came to me and stated that if the land could be examined and found to be coal land and I would take an interest with him that he would take up the land. I declined at that time to do it. And a month or something of that sort elapsed, I do not remember how long, and Mr. Brooks came to me and told me that Mr. Collins had given it up, and his option was about to expire, and in the meantime this Washington Securities Company had been virtually formed—the

formation of it had been virtually agreed upon, but the organization had not been perfected, and I referred him to the Washington Securities Company, and on the discussion of the matter with the president of the company at that time, he agreed to look into the matter if I would have an examination made of the property and see whether there was any coal on it, and I sent a man up there who spent some considerable time looking over the property and making the examination, and it was upon his report that the president of the company agreed to purchase it, but the company not being formed at that time, he requested that I take title in my name and transfer it to the company when the legal organization of the company was perfected.

Q. So far as any information that the company had of the character of this land, it was the same information, or lack of it, which you had?

A. I could not find anything—I had no knowledge of any information at the hands of the company that indicated the value of the property. The only information I had was a letter from the former manager of the company, who was then located in San Francisco.

Q. You are speaking of the Oregon Improvement Company now?

A. Yes, sir.

Q. I am speaking of the Washington Securities Company.

A. They had no knowledge whatever.

Q. Your knowledge was their knowledge?

A. Yes, that is all, and their knowledge was largely that which was acquired from the report.

CROSS-EXAMINATION.

Q. (Mr. Todd) When you say you had no personal knowledge of the character of the land during the time you were manager of the Oregon Improvement Company, you mean you never had been on the land?

A. I never had been on the land and I never had any reports of its value.

Q. You, as manager of the company, paid the expenses for keeping up the coal declaratory statements on it?

A. We did, indirectly. The reports were made to Mr. Howard in San Francisco, and at the request of the president we refunded him that money, in order to have, if possible, any information there might be connected with the land. There was not in the office of the company, according to my recollection, any report or anything that indicated the value of the land, and, within my recollection, that is, as far as I can recollect, there was nothing in Mr. Howard's office, because I have an indistinct recollection of his writing up and asking if some one would make a report on it before he went ahead with any more expenses.

Q. You were paying the expenses on it then as coal land though?

A. Yes, we were refunding to him the expense—a portion of the expense that he was paying for some

people exploring and locating our land—I don't know what they were doing in fact.

Q. Mr. Howard's interest, presumably, were in trust for the Oregon Improvement Company?

A. I assume so.

Q. When you purchased the land you had an abstract of title brought down and examined?

A. I had an abstract, yes, sir.

Q. By your attorney, or the attorney of the company?

A. By the attorney of the company.

Q. Who paid for the examination of the abstract?

A. The company.

Q. And that attorney was one of the directors of the company, was he not?

A. I don't know.

Q. You do not remember what attorney examined it?

A. H. R. Clise.

Q. Is he not one of the officers, and was he not the first secretary of the Washington Securities Company?

A. I do not remember. No, I don't think he was. I am not sure about that.

REDIRECT EXAMINATION.

Q. (Mr. Spooner) Did you have any understanding or knowledge, and, if so what was it, as to the reason why any interest in these annual payments was taken, or the declaratory statements, etc.,

were made by the company—that is, with regard to whether or not it was on the theory that it was a valuable thing, or something that they did not want to let go until they found out?

A. Before paying the first bill of these expenses that came to me—I was manager of the company and Mr. Elijah Smith was president—my remembrance is that he was here at the time—I referred the bill to him, and there being no information with reference to the section, and the section being unsurveyed government land, no possibility of obtaining any title except by purchase, the question was discussed between us as to whether it was worth while to pay any expenses or to notify Mr. Howard that he would not continue any further with the expenses; and it was requested of me to continue the expense on account of the possibility of information that it might give us with reference to coal in that section of the country, or that particular locality.

Q. They finally ceased paying even the small amounts that they were paying, didn't they?

A. Well, I knew nothing about it. The matter was left practically with Mr. Howard and I knew nothing about it, and no examination was made of it up here, and to tell you the truth, we didn't think anything of it.

Q. It was started before you had anything to do with it, wasn't it?

A. Yes, sir.

Q. When you came in the office there you found it there?

A. Yes.

Q. And your knowledge of it consisted simply of what you picked up as you have described?

A. Yes. The toleration of that which already existed.

Q. I would like you to state whether or not any information, even the little which you have mentioned here—what, if any, effect it had on your mind at the time Brooks approached you on the subject of purchasing the property for the Washington Securities Company? Did you know that it was the same section?

A. He informed me that it was section 34, located near Kanascott, and he asked whether I knew about it, and I told him no, and he went on to describe then its location with reference to other mines there beyond Franklin and within the range of Kangley and Drum and Alta and some other pieces of property that had been more or less exploited in that part of the country, and I told him then that I had an indistinct remembrance that that had been brought to my attention some years before, but that I had never seen any report or examination of it, I was not aware of the value of it, and I did not know whether it was coal or not, and I did not care to go any further with it, that was as to myself personally. When the company was formed I referred it to them and they desired first an examination. Upon that examination they made their purchase.

Q. Was the examination made, based in any way upon what you have stated existed away back in '90 and '91?

A. No, sir; in fact, I did not know there were tunnels on the property.

Q. How is that?

A. In fact, I did not know whether there were any tunnels or open prospects on the property, or that there ever had been.

Q. When did you first find that out?

A. When the examination was made they took some—the expert took some men with him, and in looking over the ground they uncovered some prospect holes and dug out some tunnel that had been more or less filled with water and debris.

Q. I wish you would state whether or not, from the report that you had from the men whom you sent there and from such other knowledge you had, whether or not that property, as coal property, is anything more at the present time than a prospect?

A. Well; no, it is a probability. It could not be determined as a mine, and in fact I was loath, even after the report was made, to take hold of it until I had secured some additional information with reference to a rock dyke that runs fairly close to that property up there, and which, in my opinion, is the reason why one of the contiguous pieces of coal property was worthless. The rock dyke having practically coked the coal in the mine, and rendered it entirely worthless.

Q. That was a matter that was found out later—what mine was that in?

A. That was the Kangley mine.

Q. That was a matter that was found out, and could only have been found out after considerable work was done and money expended?

A. There was one hundred and fifty thousand dollars and more spent on that property before it was abandoned.

Q. I would like to ask you whether or not, from the information you have, it is certain at the present time—whether it is certain that that dyke does or does not extend into this property?

A. Well, I satisfied myself thoroughly well that it did not; that is, that it did not reach this property.

Q. I understood, from your examination by Mr. Todd, that you stated at the time you and I went up there, that was the first time you had even been on the property?

A. Yes, sir.

Q. That was this fall?

A. Yes, sir.

Q. You saw considerable of the property at that time, didn't you?

A. Yes, sir.

Q. I wish you would state to the court whether or not there is anything about the topography of the section, as you saw it, and the nature of the ground and the growth of timber, etc., as you saw it, which would indicate that it is mining property; only fit for mining purposes and unfit for all other purposes?

A. No. I could not tell that. There is some very good bottom land there, and there is some pretty fair timber; and the land itself is not such as, from the mere superficial glance at it, you would say was mining land. As to the qualifications between coal and agricultural, it is pretty hard to tell. Section 8, about

four miles from there, has five different croppings of coal within twelve or thirteen hundred feet of each other, and those croppings, after having had $40,000 expended upon them, turned out to be what is known as syncline, which was in the nature of an inverted V—the coal running down a small distance and coming up again, making two croppings on the surface and having practically no body of coal, although the outer croppings would indicate an enormously valuable piece of coal.

Q. I would like to ask if you know whether the timber on that property has any value?

A. Yes. The timber has value. We have had one or two requests to buy the timber. I do not know how much there is, because I never had it cruised.

Q. You heard Mr. Colman's testimony, didn't you?

A. Yes, sir.

Q. Do you remember it, calling your attention to his testimony in which he showed the different strikes of the three veins that he mentioned?

A. Yes.

Q. I would like to ask you, from your experience in connection with coal lands and coal mines such as you had, what, if any, conclusion can be drawn as to the extent and character of the veins, from the strikes that he describes there?

A. Well, it would indicate a very troubled condition and an abnormal condition. He has a strike on one vein east and west; the next vein he has the strike northwest and the dip of the vein he has running—one 23 degrees and one about 7 degrees

and one from 30 to 35 degrees, which would indicate, in all possibility, so far as the seven-degree vein is concerned, that it might be a slip that had been carried down, carrying the coal with it, until it more or less flattened out, and that it was not in place, and his other indications are either wrong, or else the coal there is in a troubled condition, because the strike does not come around in any way which would indicate any regular curve, or one that would leave the coal in, what you might call, a regular or fixed condition.

RECROSS EXAMINATION.

Q. (Mr. Todd) Is the timber on this land second growth, Mr. Smith?

A. Yes, very largely, except the cedar. The cedar is fairly good size.

Q. Has the fir been logged off?

A. I do not see any indications of any logging on the section at all.

Q. Well, this may be the first growth of timber then, of a small size?

A. Yes. It is rather a peculiar section. I never saw very many like it.

Q. Does the timber grow large along the railroad there?

A. Well, occasional trees; generally speaking, the trees are small, what you might call poles.

Q. You have dealt with other timber in that township, haven't you?

A. I think it is in the township above.

Q. That is larger timber, farther north?

A. Yes.

Q. And it is a great deal more valuable than the timber on this section?

A. Yes; the timber that is thick is really more valuable, because it takes a less amount of roads to log it.

Q. What expert did you have examine this coal land?

A. Mr. Hawkins.

Q. Did his examination show the same thing as to strikes that Mr. Colman's examination did?

A. No, sir.

Q. Did he examine the same veins that Mr. Colman did?

A. Well, I cannot tell you whether he examined the same veins. I do not bear in mind now the cross section of his veins, but the dip and strike of his veins were not in accordance with Mr. Colman's testimony.

Q. (Mr. Spooner) Where is Mr. Hawkins?

A. I don't know. He is a civil engineer and I am inclined to think he is out doing some work for one of these railroad companies at the present time.

Q. In this state or in Alaska?

A. In this state. He has been in Alaska, but he has just returned lately, and I think he is out now for the Milwaukee road doing some engineering work.

Mr. Spooner: I will now offer all these photographs that were identified by Mr. Brockway as exhibits in this case.

Photographs were received in evidence without objection and marked respondent's exhibits "1," "2," "3," "4," "5," "6," "7" and "8."

Mr. Todd: What do you want shown on the map?

Mr. Spooner: I want some of the surrounding sections, and this section shown in a proper way. It may be that your map is exactly right, but I would like to have a little larger map and a better one, so that it could be used by both of us in arguing the case.

Mr. Todd: I do not see any objection to that.

Mr. Spooner: Then, we will consider our testimony closed, with the exception that we will try to agree upon some plat and we will put it in.

Mr. Todd: All right.

December 14, 1909, 10 o'clock a. m.

Continuation of proceedings pursuant to agreement.

C. J. Smith, recalled on behalf of the defendant, testifies as follows:

Q. (By Mr. Spooner) Mr. Smith, what do you know about the height of the hill or mountain known as Sugar Loaf?

A. I think it is between four and five hundred feet high?

Q. Do you have any information other than your own observation?

A. The engineer I sent up there reported it to be something over four hundred feet by barometric reading.

No one reading the record and the foregoing testimony could possibly conclude that Mr. Smith recalled anything about these lands until they were submitted to him by Mr. Brooks, nor could they conclude that the information which he secured sixteen years before (if he ever secured any) was the reason which prompted the purchase of the land. In any event, the record utterly fails to show that these prior circumstances were *present to his mind* at the time he purchased the land. Such a conclusion is clearly refuted by his direct statement that he had forgotten all about the land and only purchased it upon the reports of engineers employed to examine it after Mr. Brooks had brought it to his attention.

Where then is that proximity between his association with the Oregon Improvement Company and the purchase of the land by the appellant, which the Supreme Court of the United States holds necessary in order to impute an agent's knowledge to his principal?

Where is it shown that Mr. Smith recalled a single circumstance connected with the land until

after patent, and before the time Mr. Brooks submitted it to him?

Where is it shown that the prior negotiations were present to Mr. Smith's mind at the time he purchased from the homesteaders?

Where is it shown that he communicated a single fact acquired during his receivership of the Oregon Improvement Company to appellant?

Where is it shown that he relied upon such information or any information except that given by engineers employed to examine the land after patent?

Where is it shown that he ever assisted the patentees in procuring their patents or even knew that they had done so, and is it not significant that if he intended to perpetrate a fraud upon the government that he did not assist them?

Where has the government succeeded in showing these essential facts, even by presumption, to say nothing of that *"clear, unequivocal and convincing"* testimony which the law requires?

Are the facts and circumstances as a whole inconsistent and irreconcilable with the integrity and legality of the acts of Mr. Smith and the appellant company? Is it not singular and significant that

nowhere is anyone representing the company even charged with assisting in the procurance of the patents?

To warrant the cancellation of these patents two things at least should have been proved by clear, unequivocal and convincing testimony:

1. That Mr. Smith was possessed of sufficient guilty knowledge to warrant a cancellation of these patents as against him.

2. That such knowledge, if possessed, was imputable to appellant.

As we are convinced an answer to the latter proposition will warrant a dismissal of this case, we discuss it first.

Judge Sharswood, in a much-discussed case, said:

"The true reason of the limitation is a technical one, that it is only during agency that the agent represents and stands in the shoes of his principal. Notice to him is then notice to his principal. Notice to him twenty-four hours before the relation commenced is no more notice than twenty-four hours after it had ceased would be."

Houseman vs. Gerard, 81 Pa. St. 256.

Story on Agency, Sec. 140.

While this case has been followed by many courts, we frankly concede that it has been qualified by the doctrine announced by the Supreme Court in *Harrington vs. United States,* 11 Wall. 256, 20 L. Ed. 167. However, as the latter case fully supports all for which we contend, we will not stop to discuss their respective merits.

In *Harrington vs. United States (supra)* the question of *"How far a purchaser is affected by notice of prior liens, trusts or frauds by the knowledge of his agent who effects the purchase,"* was directly presented to the Supreme Court of the United States, and the doctrine of imputed knowledge discussed at length. The court, per Mr. Justice Bradley, carefully reviewed the decisions, and concluded: (1) That the presumption of knowledge depended upon the lapse of time between the purchase and time when the knowledge was acquired by the agent. (2) That the principal was not bound by such knowledge unless present to the agent's mind at the time of the purchase. (3) That there must be clear and satisfactory proof that it was so present, and that if the agent acquired the knowledge at the time he effects the purchase no question can be raised as to his having it at the time.

As stated by the court, Law Ed., page 170:

Harrington vs. United States, supra, 20 Law Ed. 170:

"If he acquire the knowledge when he effects the purchase, no question can arise as to his having it at that time; *if he acquired it previous to the purchase, the presumption that he still retains it, and has it present to his mind, will depend upon the lapse of time and other circumstances.* Knowledge communicated to the principal himself he is bound to recollect, *but he is not bound by knowledge communicated to his agent, unless it is present to the agent's mind at the time of effecting the purchase. Clear and satisfactory proof that it was so present seems to be the only restriction required by the English rule as now understood."*

There is no attempt to show that the company ever heard of the land before patents were issued, consequently the only question is whether Mr. Smith's knowledge was chargeable to it.

The only direct proof upon this point is Mr. Smith's own testimony, and he flatly denies any recollection of the circumstances occurring while he was receiver of the Oregon Improvement Company, and there is certainly nothing to show that these circumstances were *present to his mind* when he bought the land. In the absence of direct proof, we are forced into the realm of conjecture or presumption. The Supreme Court says:

"The presumption that he still retains it, and has it present to his mind, will depend on the *lapse of time* and other circumstances, and that *clear and satisfactory* proof that it was so present is necessary."

It certainly cannot be presumed, as a matter of law, that Mr. Smith recalled the meagre circumstances connected with this land which the record shows to have occurred nearly sixteen years ago, and it is only reasonable to assume that he forgot them. Be that as it may, it is certain that the government has not shown by clear and satisfactory proof that they were present to his mind at the time—especially in the face of his direct denial.

What has been said we think effectually shows a clear failure of necessary proof, but out of abundant caution we wish to call attention to the further fact that the company was not even organized until after the patents were issued, and is therefore not chargeable with what was done before that time.

"A corporation can have no agents until it is brought into existence."

Davis, etc., Co. vs. Davis, 20 Fed. 699.

"Any knowledge or notice which an agent may receive while acting for another party or association, or which any individual member of the corporation

may have obtained prior to the constitution of the corporate body, most certainly would not, as a matter of law, by implication, be carried over and imputed to the corporation simply because one or more of the members of a previously existing concern may have become officers or stockholders of the corporation, nor because such agent afterwards became an agent for the corporation."

Brennan vs. Emery-Bird-Thayer Dry Goods Co., 99 Fed. 971, 972.

II.

Let us now disregard the question of imputed knowledge and look to see whether there is sufficient in the record to warrant a cancellation of these patents, even as against Mr. Smith or the entrymen.

All the cases, including those heretofore cited, are at one on the following proposition, viz.

That cancelling an executed contract is an exertion of the most extraordinary power of a court of equity, and the power should never be exercised for an alleged fraud unless it is established by clear, unequivocal and convincing testimony. It cannot be done upon a bare preponderance of evidence and the fraud is never presumed, but the burden of producing proof and of establishing it is upon the govern-

ment, from which it is not relieved, although the proposition to be established is of a negative nature.

"This rule applies with increased force where the government seeks to cancel a patent which has been issued by it. * * * The facts established, as a whole, should be inconsistent and irreconcilable with the integrity of the patent or the integrity and legality of the actions of the defendants charged with the fraudulent entries and should be so satisfactory as to make it clear to the court that the land was procured by fraud."

United States vs. Detroit Himber & Lbr. Co., 124 Fed. 373; affirmed in 200 U. S. 321 (50 L. Ed. 499).

Both of these opinions were most carefully considered and support our contentions fully.

The decisions were reviewed and quoted in *United States vs. Mills,* wherein it is said:

"Cancelling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear. *Atlantic Delaine Co. vs. James,* 94 U. S. 207, 24 L. Ed. 112.

A suit by the government to set aside or annul a patent issued by it should be sustained only when the allegations on which it is attempted are clearly stated and fully sustained by proof. *U. S. vs. Stinson,* 197 U. S. 203, 25 Sup. Ct. 426, 49 L. Ed. 724;

U. S. vs. Budd, 144 U. S. 154, 12 Sup. Ct. 575, 36 L. Ed. 384.

In the case of the *United States vs. DeMoines & Co.,* 142 U. S. 541, 12 Sup. Ct. 316, 35 L. Ed. 1099, the court said: 'Muniments of title issued by the government are not to be lightly destroyed.'

In a suit by the United States to cancel a patent of public land, the burden of producing proof and establishing the fraud is on the government, from which it is not relieved, although the proposition which it is bound to establish may be of a negative nature. *Colorado Coal & Iron Co. vs. U. S.,* 123 U. S. 307, 8 Sup. Ct. 131, 31 L. Ed. 182.

The testimony on which this is done must be clear, unequivocal and convincing. It cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. *Maxwell Land Grant Cases,* 121 U. S. 325, 7 Sup. Ct. 1015, 30 L. Ed. 949; *United States vs. San Jacinto Tin Co.,* 125 U. S. 273, 8. Sup. Ct. 850, 31 L. Ed. 747.

Fraud is never presumed, and it devolves upon him who alleges fraud to show the same by satisfactory proof." *Walker vs. Collins,* 59 Fed. 70, 8 C. C. A. 1.

In the case of *United States vs. Detroit Timber & Lumber Co.* (C. C.), 124 Fed. 393, the court said:

"This rule applies with increased force where the government seeks to cancel a patent which has been issued by it. * * * The facts established, as a whole, should be inconsistent and irreconcilable with the integrity of the patent or the integrity and

legality of the actions of the defendants charged with the fraudulent entries, and should be so satisfactory as to make it clear to the court that the land was procured by fraud."

United States vs. Mills et al., 169 Fed. 686.

We are curious to know where the government has established any fraud on the part of Mr. Smith, and are confident that counsel will be unable to point it out or to show that it has been proved with that degree of precision which the foregoing decisions hold necessary. According to the bill, the several patents were issued several years before Mr. Smith purchased the land, and the bill was not filed until nearly two years after his purchase. There is no charge made or attempt to show that Mr. Smith, or any one connected with appellant, assisted the patentees in securing the land. In fact, it is not even alleged that he knew them or that they had entered upon the land until he bought it for appellant.

On the other hand, the proof clearly shows that the land department knew of the character of the land and issued the patents in the light of that knowledge. After having done so, it stood idly by until nearly two years after it had been sold to appellant before taking steps to cancel the patent.

While from a cold-blooded legal standpoint the government is probably not estopped from attacking the patents, its laches should certainly operate strongly against it in the mind and conscience of a court of equity. No reason is given for the delay, and the information which the government possessed at the time of the trial was known to it long before we bought the land. If there was any fraud or deceit practiced it was by the homesteaders, and they are the ones who should be made to bear the punishment. Appellant has done nothing wrong, neither has Mr. Smith, unless it was wrong to have signed the voucher for $51.50 as receiver for the Oregon Improvement Company in 1896, and to have written the letter dated December 9, 1890, asking Mr. McNeill to let him know what he thought of Section 34.

Surely these transactions would not preclude Mr. Smith from becoming a *bona fide* purchaser of the land ten or fifteen years after they occurred. It is a matter of common knowledge that what is considered an excellent prospect one day may develop to be worthless the next, and it is equally true that land which is considered only valuable for agricultural purposes may turn out to contain wonderful deposits of ore.

To our minds the record does not contain enough evidence to warrant a cancellation of these patents. even in the hands of the entrymen.

So far as the evidence shows, the land was in substantially the same condition in regard to possibilities for agriculture and timber at the time these patents were issued as at the present time; and the admissions as to the presence of agricultural land and timber throughout the government's testimony, to which reference has been made earlier in the brief, as well as the testimony of the Messrs. Harrington and Mr. Beal in regard to the agricultural quality of the land, show that Section 34 was not land which could be truthfully said to be inherently unfit for raising crops. Furthermore, no witness for the government who expressed an opinion that this land was more valuable for mineral than agricultural purposes had shown the slightest qualification for passing on the agricultural value of land.

The testimony of the government falls far short of showing that Section 34 was ever *known* mineral land or that it is such today. Most of the questions put by the government to its witnesses made inquiry as to whether the land was known *as* mineral land, and the answers bore in a general way on the belief

of persons. There is a great and significant difference between land being *known as* mineral land and *known to be* mineral land. The first expression does not, while the second does satisfy the statutes of the United States and the decisions of the Supreme Court construing them. The foregoing, taken in connection with the fact that at the time the patents were issued the land had never been mined for coal; that the development work had resulted in nothing more than a prospect, and that while the land was surveyed in 1895 and open to mineral filings from then on, no one of the filers had followed up this valuable "mineral section," and you have a situation in which, even as to patentees, not only was the mineral character or the non-agricultural quality of the land not known, but, aside from the mere fact of its surface being rough, it was land that gave every indication of being just what it was described to be in Forsythe's final proof, "timbered farming land." Even as between the government and the patentees, this state of facts as shown by the evidence is very far from the "clear, unequivocal and convincing" proof required by the decisions of the Supreme Court in order to set aside patents of the government.

But, as we view it, the question of whether or not the patentees dealt fraudulently or unfairly with

the government is wholly immaterial in this case. The government takes the position that, if this land was known to be mineral land at the time the patents were issued, the defendant cannot be a *bona fide* purchaser from the patentees. We take the position that, not only was the land never *known* mineral land, but that the Washington Securities Company is a *bona fide* purchaser, and entitled to the protection of the court, irrespective of what the land actually was known to be at the date of the patent, unless it knew or should have known, either from the character of the land itself, or from other sources of knowledge, that the *patentees could not have obtained homestead patents without defrauding the government.*

In other words, the knowledge of the patentees is not the test of the *bona fides* of the purchaser, but the test must be *what the purchaser knew about the knowledge of the patentees at the date of the patent.* Land may be, and often is, on its surface, farming land merely, or covered with timber, and yet contain mineral deposits of such value and extent as to make its agricultural value of such comparatively small moment as to make it mineral land, and not subject to homestead entry.

Suppose the patentee knew of its mineral character, and knew he had defrauded the Government

in his homestead proof, is a purchaser who buys it from the patentee, knowing it to be mineral land, *but not knowing that the patentee knew or was bound to know its mineral character at the date of patent,* obliged to assume that, because it is now known to him and the owners to be mineral land, it must have been so known to the patentee at the date of patent, and this, notwithstanding the fact that on its surface the land is fit for agricultural purposes?

When the land is of such a nature that it is possible for it to have been honestly patented as farming land, must the purchaser assume the contrary, and that the patentee must have defrauded the Government into inadvertently issuing a homestead patent? If that is the law, a patent of the United States is a very slender reed upon which to base a purchase. In order to measure this case by the test we are suggesting, let us examine for a moment the situation in which Mr. Smith finds himself in purchasing this land from the patentees. Complainant's Exhibits "F," "G," "H," "I" and "J," to sum up their results, put Mr. Smith in possession of the following information:

That the Oregon Improvemenut Company, through Mr. Howard, was paying $51.50 a year back in 1890, as one-third of the cost of keeping up certain

mineral filings on section 34. In regard to the value of the section, Mr. Howard wrote Mr. Smith, November 8th, 1890, and, referring to previous dates; says, that it was then regarded as a valuable section; and various reports had been made to him about its value, *some favorable and some otherwise; that if it was good they wanted to keep it, otherwise they wanted to let it go.*

In December, 1890, Mr. Howard wrote Mr. Smith again, stating that the company had a one-third interest in the section, ostensibly in his name, but really for the company under a declaration of trust. He states that he has repeatedly tried to get the company to determine whether it wishes to keep on paying any of the expense of holding this unsurveyed land.

Pursuant to these letters of Mr. Howard, Mr. Smith, on December 9th, wrote Mr. McNeill as follows:

"Please let me know what you think of section 34, marked on the map in the name of J. L. Howard. Is there anything in it, or have you ever made any examination of it?"

To which letter, Mr. Smith never received any reply.

On January 13th, 1897, Mr. Whitworth wrote Mr. Howard, stating he was sending an account for his share of cost of holding land for two years, and he states:

"Don't you want to buy out some or all of our interests? McGuire and I would be glad to dispose of our shares (we each own two-fifteenths) at a low price; and I think Colman and Smithers will also; or do you know of anyone else who wants to buy a good section of coal cheap?"

And the further exhibit is a voucher signed by Mr. Smith for Mr. Howard's share of this expense.

In connection with these exhibits, and in explanation of them, we now call your attention to testimony of Mr. Smith, commencing on page 155, in which he states that the first he ever heard of section 34 was in the latter part of 1890, or the beginning of 1891; *that while he was connected with the Oregon Improvement Company he had no personal knowledge whatever of the character of this section; and that, from the time he left the Improvement Company until the time he purchased this section, he had not acquired any information as to its character;* that, up to the time he was approached by a representative of the homesteaders with a view to selling the land, he had not even known that it had been

taken up as a homestead or in any other way; that he was first approached on the subject of the purchase of this section about three months before its actual purchase; that he took the matter up with the president of the Securities Company, then in process of formation, and it was agreed to look into the matter; and that he (Smith) sent a man up there who spent some considerable time looking over the property and making an examination, and that upon this man's report the company agreed to purchase it; that the Washington Securities Company had no knowledge whatever of the character of this land except what it obtained at the time of purchase; that he (Smith), while with the Oregon Improvement Company, had never been on the land, and had never had any reports of its value; that he never saw the land until after this suit was begun; that the question of paying any share of expense in connection with filings on section 34 had come up before he had anything to do with the Oregon Improvement Company; and that he (Smith) found this condition existing when he came into office, and that it was allowed to continue without any knowledge on his part as to the value or lack of value of the section.

So much for the supposed knowledge of Mr. Smith in regard to the character of this land at the

time he was connected with the Improvement Company.

Suppose, at the time of the purchase, he had made an examination of the land himself, what would he have found? One or two tunnels, the longest fifty feet, amounting to nothing more than prospect holes, and partly caved in at that. A section, three-fourths of which consisted of what the Messrs. Harrington and Mr. Beal assert is agricultural land *"away above the average of the land that is under cultivation in this state,"* the entire section being practically covered with either first or second growth timber. What would an examination of the record have shown him? Exhibit "D" would have shown him that a homestead patent was issued to Turner after proper final proof, proper publication in a King County paper from November 14th, 1901, that the register of the land office certified to the posting of the proper notice in a conspicuous place in the land office for thirty days from November 12th, 1902; that the proof showed five acres slashed, three acres cultivated, crops raised one year, and improvements of the value of from $900 to $1,000. It also would have shown a letter from the attorneys of Turner in the City of Washington, D. C., to the Commissioner of the General Land Office, which letter, dated August 15/03,

mentions the fact that the patent had been delayed on account of mineral filings, and that the Commissioner by his letter of August 13 03, had cancelled all the coal filings and relieved the final entry from suspension."

Exhibits "A," "B" and "C" would have shown that, notwithstanding the fact that Turner's patent, which was the first one, was held up until the General Land Office could pass upon and cancel certain coal filings; that several years afterward there were issued to Barbee, Forsythe and Olsen, homestead patents for the balance of this section. He would also have found that this section was surveyed in 1895 and that, from that time on, it had been open for entry; that, notwithstanding that fact, not only had no one obtained a mineral patent, but that, after approximately eight years, a homestead patent had been granted.

Suppose in addition, Mr. Smith had known that there was considerable gossip in the neighborhood to the effect that there was coal on this land, and that certain persons believed there was, for that is about all the testimony of its general reputation amounts to. Add to this the fact that, notwithstanding all the foregoing, the Government had seen fit to issue home-

stead patents on this section, would the court, in view of all these circumstances, be justified in cancelling the title of the Washington Securities Company to section 34, on the theory that Mr. Smith knew or should have known, either from the information we have just been detailing, or from the appearance of the land itself, that section 34 was so unmistakably mineral in character, and non-agricultural in character, that the patentees could not possibly have received patents from the Government of the United States without first having defrauded the Government into inadvertently issuing the patents?

The Government brings in Mr. Smith's former relations to the Improvement Company on the theory that it shows his knowledge as to the coal character of section 34. Assuming, what is entirely contrary to the evidence, that, while with the Improvement Company, he knew that section 34 was, with good reason, thought by officers of the company to be coal land, what significance was Mr. Smith to attach to the fact that, years afterwards, the land having been open during most of those years, he finds that neither the company nor anyone else has ever made good on coal filings, and that section 34 has been patented as a homestead? Take these facts, and the many filings that are alleged to have been made, together with

the record showing that the General Land Office at Washington had, after suspending the first homestead patent on section 34, cancelled the coal filings and issued the patent, could Mr. Smith come to any other conclusion than that, when the patent was made, the land was not considered sufficiently mineral in character to exempt it from homestead entry, or must he conclude that, because the land now appeals to him as coal land for the Securities Company, *the patentees must have perjured themselves in their filing proof, and the Government, notwithstanding the notice to it furnished by various coal filings, gone out of its way to be deceived into cancelling all of the coal filings and into issuing the homestead patents?* That would be putting a burden upon a purchaser, the substance of which would require that he place no reliance whatever upon the Government's patent; that he presume dishonesty on the part of the patentee and utterly disregard the character of the land, notwithstanding it is such as to make it at least possible that all proceedings in connection with the homestead patent were honest and without fraud on the Government.

Mr. Smith testifies that he never saw this land until after this suit was begun. Perhaps counsel will suggest that it was his duty to have made an examina-

tion of the land in order to satisfy himself of its character. No such burden or obligation is placed upon the purchaser in order to preserve his *bona fides.* In the case of *United States vs. California and Oregon Land Company,* reported in 148 U. S. 31, there was involved the good faith of a purchaser of land which could only be sold as fast as certain portions of a military road in the State of Oregon were completed, such completion being attested by certificates of the Governor of the State. In an effort on the part of the United States to set aside the purchaser's title, on the ground that it was not a *bona fide* purchaser, it was claimed that, inasmuch as a simple examination of the road would have shown that the necessary portions had not been completed in accordance with the Governor's certificate, the purchaser had failed to exercise proper diligence necessary in order to protect his good faith. The Supreme Court held otherwise. On pages 44 and 45, after stating that the purchasers knew nothing wrong as to the title, and that the determination of the completion of the road was left to the Governor, and that they had seen his adjudication upon that question, the court say:

"Can it be that they must be adjudged derelict in diligence because they did not make a personal

examination of the road, and determine for themselves whether it was in its entire length completed so as to satisfy all the terms of the grant? If a patent from the Government be presented, surely a purchaser from the patentee is not derelict and does not fail in such diligence and care as are required to make him a *bona fide* purchaser, because he relies upon the determination made by the Land Officers of the Government in executing the patent, and does not institute a personal inquiry into all the anterior transactions upon which the patent rested."

To sum up, then, the land is not even yet proven to be mineral land. It is not proven that it was anything more than believed to be mineral land at the date of patent, to say nothing of having been *known to be* coal land at that time. It is not proven that, at the present day, it is more valuable for mining than agriculture and timber. No witness who stated that, claimed to know its value for either of the latter purposes. It is proven that, on its face, the land could have been honestly patented as "timbered farming land"; that neither Mr. Smith nor the Securities Company knew that, in the vicinity, it was ever considered coal land at the date of patent, much less that it was *known to be.* The Securities Company, relying on the patent and the presumptions that underlie it, paid a valuable consideration in good faith for section 34; and it is respectfully sug-

gested to the court that proof much more "clear, unequivocal and convincing" should be adduced before depriving it of its property.

III.

Aside from the facts heretofore discussed, there is another reason which dispells all idea of fraud on the part of Mr. Smith or appellant, viz., the decision of the Land Office in favor of the homesteaders and against the mineral claimants. In addition to the moral effect which this decision has it is likewise legally conclusive upon the issues here.

This for the reason that a Departmental decision is binding upon the courts as to any disputed fact presented.

We use the word "disputed" advisedly, as we recognize that there are two distinct lines of decisions in the Supreme Court upon the finality of a Departmental ruling and of its binding effect upon the courts.

The one class, such as *United States vs. Minor,* 114 U. S. 233, (29 L. ed. 110), holding that the Departmental decision does not estop the Government from going behind it and cancelling patents which have issued upon fraudulent ex parte testimony in

cases where there are no conflicting claims, the other holding that where a Departmental finding is made upon any disputed fact in an adversary proceeding, that it is binding not only upon the parties to the controversy, but upon the Government and all other persons as well.

The distinction though clear and well recognized, has been sometimes ignored by other courts, and we therefore anticipate respondent's argument upon it.

The rule as we take it is this:

Where the proceedings are wholly ex parte and the Government compelled to rely upon the evidence of the party charged with fraud, the Department's finding of a particular fact or circumstance is not binding or conclusive. On the other hand, where there is a disputed question presented to or considered by the Departments "their decisions are final to the same extent that those of other judicial or quasi judicial tribunals are."

Vance vs. Burbank, 11 Otto, 514 (25 L. ed. 929).

Greenameyer vs. Coate, 212 U. S. 434 (53 L. ed. 587).

Quinby vs. Conlan, 14 Otto, 420 (26 L. ed. 809).

DeCambra vs. Rogers, 189 U. S. 119 (17 L. ed. 734).

It can hardly be denied that the character of this land was in dispute before the Department, and was one of the facts considered in determining the rights of the homesteaders. Mr. Sydney Williams, an attorney at law, testified that he filed upon the land as a mineral claimant shortly after the homesteaders had filed and before they had made final proof. He also said that he tendered the required amount to the Land Office and kept his filing good. (Record, p. 71.) At pages 71 and 72 he testified as follows:

"Q. Did you keep your filing good?

A. Yes sir, I made a tender of $3,200 to the Land Office.

Q. Then you contested their filing, did you?

A. No, it didn't go any further. They refused to accept my money, the Land Office held it was more valuable for other purposes, and gave me back my money.

Q. And what, if any, showing did you make to substantiate your filing?

A. I made the same talk I have made here about the coal being there.

Q. In what way did you make that showing?

A. I had witnesses.

Q. That was before the office here?

A. Yes sir.

Q. And, as the result of that showing, they refused to accept your tender?

A. Returned—

Q. (Interrupting). And turned down your filing?

A. Yes sir."

This testimony demonstrates clearly that the department was aware of the conflicting claims concerning this land and that it must have considered them in arriving at its decision.

The trial court recognizes this, but proceeds upon the theory that because the record contains no explanation of the conduct of the Land Office officials in allowing the homestead entries in preference to the coal claims, that their decision is open to attack. In regard to this point, we wish again to call your Honors attention to the fact that there is no allegation in the bill or attempt to prove that the Departmen officials committed any fraud, and it was certainly not incumbent upon us to explain their acts in the absence of such allegation, but to the contrary, the burden was upon the Government to show by clear and satisfactory testimony that they had neglected their duty.

From what has been said at least three reasons have been shown why the decree of the lower court should be reversed:

In the first place, the Department's finding is conclusive and the Government is now estopped to question it. In the second, no fraud or deceit was practiced by Mr. Smith, nor has it been shown that he was aware of anything done by the homesteaders or chargeable with their alleged but unproved misdeeds. In the third, the pretented knowledge and consequent wrong of Mr. Smith is not imputable to appellant, who bought the land as an innocent *bona fide* purchaser for value, and therefore entitled to hold the same, notwithstanding anything the homesteamers may have done or left undone.

Respectfully submitted,

CHAS. P. SPOONER,
H. R. CLISE,
C. K. POE,
Attorneys for Appellant.
610 New York Block, Seattle, Washington.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

WASHINGTON SECURITIES COMPANY, a corporation, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee*.	No. 1988.

Upon Appeal from the United States Circuit Court, for the Western District of Washington, Northern Division.

Brief of Appellee

ELMER E. TODD,
United States Attorney.

BROWN, DAVID & NEWMAN, 201 GRAND TRUNK PACIFIC DOCK

FILED
OCT 16 1911

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

WASHINGTON SECURITIES COMPANY, a corporation, *Appellant*, *vs.* UNITED STATES OF AMERICA, *Appellee.*	No. 1988.

Upon Appeal from the United States Circuit Court, for the Western District of Washington, Northern Division.

BRIEF OF APPELLEE

STATEMENT.

The bill of complaint alleges in substance that the section in question was a part of the public domain of the United States prior to the issuance of

the patents to the homestead entrymen; that it was known mineral land and contained valuable workable deposits of coal in such quantities and of such character that it was more valuable to be mined for its coal than to be used for agricultural purposes, as the patentees well knew at the time of their application to purchase, and at the time they received their patents, and as the defendant well knew at the time it purchased said lands; that said land was subject to entry as coal land, and was not subject to entry under the homestead laws. The bill further alleges that each of the four entrymen in their final proof testified that the land was most valuable for agricultural purposes; that there were not any indications of coal on it; that he was well acquainted with the character of the land, and there were not, to his knowledge, any deposits of coal within the limits thereof; that said testimony so given was false and fraudulent, as the entryman well knew, and was made by him for the purpose of fraudulently obtaining from the United States title to said land. That after said final proof the officers of the Seattle Land Office, through mistake and inadvertence and without authority of law, issued a Receiver's receipt upon which a patent was afterwards issued. That the entrymen

thereafter conveyed the land to one C. J. Smith, who was the agent of the defendant for the purchase of said land and who acquired said land solely for the use and benefit of and in trust for the defendant to whom he afterwards conveyed the title. That the defendant and its agent at the time of the delivery of the deed from the patentee, and for a long time prior thereto, well knew that said land contained valuable deposits of coal, and that it was mineral land and more valuable to be mined for said coal than to be used for agricultural purposes, and that it was not subject to entry under the homestead laws of the United States.

The answer admits that said land contained valuable workable deposits of coal, but denies all of the material allegations of the bill, except that it admits the homestead entries and the patents issued thereunder, and the conveyances made to C. J. Smith, as its agent, and subsequent conveyances by him to itself.

All of the substantial material allegations of the bill of complaint are conclusively proved, or are admitted. Counsel for the appellant fails to apprehend the theory of the Government's case. No fraud is charged against the defendant or against its agent,

C. J. Smith, but the allegations of the bill and the proof showed that the defendant and its agent had knowledge sufficient to put them upon inquiry as to the good faith of the entrymen, and as to the validity of the homestead entries, and that the defendant cannot maintain that it is a *bona fide* purchaser without notice of the antecedent fraud.

The evidence shows conclusively that the entrymen were guilty of the grossest fraud. This section at the time of the issuance of the patents and at the time of the making of the final proof, was, and ever since the year 1881, had been *known* coal land, and known to be valuable because of the deposits of coal therein, and more valuable for its coal than to be used for any other purpose. (Record, pp. 22, 29, 30, 51, 52, 58, 73, 90, 112, 140 and 141). The entrymen all knew at the time of the making of their entries and at the time of final proof that this was coal land; they had worked in and about the coal mines in that vicinity for many years prior to entry, and their conduct and conversations after making their homestead entry, and prior to their final proof, shows such knowledge on their part. There were outcroppings of coal on the land, and coal tunnels and a slope had been driven disclosing veins of coal. Some witnesses

testified that they had informed the different entrymen that they could not enter these lands as homesteads, and other witnesses testified that they had been driven off from this land by the entrymen when they were seeking to perfect filings under the coal land laws. (Record, pp. 20, 21, 28, 31-36, 40, 41, 58-60, 69, 70, 83, 85, 92, 96-98, 100, 101, 110 and 111).

The defendant company purchased this land as coal land, had the abstract of title examined by its attorney, and knew or should have known that the lands were acquired by homestead entries. The lands were conveyed to C. J. Smith, who purchased on behalf of the company and took title merely in trust for the company, and upon the organization of the company became its vice president and one of its directors. While general manager and afterwards receiver for the Oregon Improvement Company, he had previously dealt with this section as coal land. Coal was discovered upon this land in the year 1882, and one F. H. Whitworth, a well known citizen of Seattle, with three others, formed a syndicate to exploit the land and open a coal mine, and over Eight Thousand Dollars had been spent in development work. One John L. Howard, an agent of the Oregon Improvement Company, held one-third interest in

the syndicate, which he merely held in trust for the Oregon Improvement Company, which company contributed one-third of the expense of maintaining the possessory rights of the syndicate. On November 8, 1890, Mr. Howard wrote to Mr. Smith as general manager of the Oregon Improvement Company, stating these things, and again on December 8th. Smith thereupon made inquiries of one H. W. McNeil, an officer of the company, as to his opinion of Section 34. The result of this inquiry must have been satisfactory to Mr. Smith, because as receiver of the company he continued to pay the company's share of the expenses on this land up to January 30, 1897. (Plaintiff's exhibit "J").

POINTS AND AUTHORITIES.

In all cases, lands valuable for minerals are reserved from sale, and title to them can only be acquired under the provisions of the United States statutes relative to the sale of such lands. Section 2318 R. S.

No mineral lands are liable to entry and settlement under the homestead laws. Section 2302 R. S.

Coal lands are mineral lands within the meaning of the United States Statutes.

Mullan vs. U. S., 118 U. S. 271.

No title from the Government to lands known at the time of sale to be valuable for minerals can be obtained under pre-emption, homestead or townsite laws, and patents issued under the homestead, townsite or pre-emption laws to lands known to be valuable for mineral deposits are void and can be set aside in a suit in equity brought by the United States.

Morton v. Nebraska, 21 Wall. 660.
Western Pacific R. R. Co. v. U. S., 108 U. S. 510.
Mullan v. U. S., 118 U. S. 271.
U. S. v. Mullan, 10 Fed. 785.
Deffeback v. Hawke, 115 U. S. 392.
U. S. v. Central Pacific R. Co., 84 Fed. 218.

Such title is void when held by purchasers from the patentee who took with full knowledge of the mineral character of the land.

U. S. v. Central Pacific R. Co., 84 Fed. 218.
Mullan v. U. S., 118 U. S. 271.
Western Pacific R. R. Co., v. U. S., 108 U. S. 510.

ARGUMENT.

Lands that are known to contain deposits of coal cannot be entered under the homestead laws of the United States. Section 2318 of the Revised Statutes provides:

"In all cases, lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law."

Section 2302 of the Revised Statutes provides:

"No distinction shall be made in the construction or execution of this chapter on account of race or color, nor shall any mineral lands be liable to entry and settlement under its provisions."

"This Chapter" referred to, is Chapter Five, entitled, "Homesteads" of title XXXII of the Revised Statutes, entitled, "The Public Lands."

Under the pre-emption laws (Section 2258 R. S.), lands were not subject to the rights of pre-emption on which were situated any *known salines or mines,* and the same provision of law applied to the acquisition of title under the homestead laws. (Section 2289 R. S.) But with the repeal of the homestead laws, Section 2289 was amended by the Act of March 3, 1891, (26 Stat. L. 97), and by the amend-

ment all the language in that section referring to the pre-emption laws was eliminated. Thereupon entries under the homestead laws became subject only to the provisions of Section 2302 R. S., which provides that no "mineral lands shall be subject to entry and settlement under its provisions." A full discussion of this point with reference to decisions by the United States Supreme Court is set forth in the opinion of the Circuit Court in *Cosmos Exploration Company v. Gray Eagle Oil Company,* 104 Fed. 20, pp. 46-50.

A history of the legislation of Congress relative to the reservation of mineral lands from entry is discussed at length in the opinion of the Supreme Court in *Deffebeck v. Hawke,* 115 U. S. 392, and it was held in that case, that the test was, whether the lands at the time of their sale were known to be valuable on account of their mineral deposits; and in *Davis v. Wiebold,* 139 U. S. 507, the court said:

"The exceptions of mineral lands from pre-emption and settlement and from grants to States for universities and schools, for the construction of public buildings and in aid of railroads and other works of internal improvement, are not held to exclude all lands in which mineral is found, but only those where the mineral is in sufficient quantity to add to their

richness and to justify expenditure for its extraction, and known to be so at the date of the grant. There are vast tracts of country in the mining states which contain precious metals in small quantities, but not to a sufficient extent to justify the expense of their exploitation. It is not to such lands that the term "Mineral" in the sense of this statute is applicable."

Coal lands have been held by the Supreme Court of the United States in the case of *Mullan v. U. S.*, 118 U. S. 271, to be mineral land within the meaning of the United States Statutes.

The true test therefore to ascertain whether land comes within the reservation prescribed by Congress as being mineral lands, is whether the mineral is contained in them in sufficient quantities to justify the expense of exploitation, and such lands are known to contain such mineral at the time of the grant or sale. Applying this test to the section involved in this case, we find that it is admitted in the answer (Record, p. 12), "that said lands contained, and still contain, valuable workable deposits of coal." Witness after witness for the Government testified that this section had been known to all persons in the vicinity since 1882 as coal land. It was proved that something over Eight Thousand Dollars had been spent in exploitation of these lands by the syndicate which discovered

them and filed upon them, but which failed to perfect its entry because of lack of capital, until after the entrymen had made their homestead entries thereupon. At the time of the making of these entries, evidence of the work done in exploitation was apparent. There were two tunnels and the slope upon the section, and outcroppings of coal. (Complainant's exhibit "E"). The homesteaders were all men who had worked in and about mines for many years, and had lived in the vicinity where this section was known as coal land. The testimony shows that without dispute the land was more valuable on account of its coal than for agricultural purposes.

Defendant's exhibits 1 to 8 showed the character of the land and corroborates the testimony of the witnesses for the Government. The section is known as Sugar Loaf Mountain, the center of it culminating in a peak between four and five hundred feet high. That the homestead entries were conceived and executed in fraud, there can be no question. Neither can there be any question that the officers of the United States were without authority to issue receiver's receipts and execute patents, because these lands were not subject to homestead entry.

In *U. S. v. Stone,* 2 Wall. 525, the Supreme Court uses the following language:

"A patent is the highest evidence of title, and is conclusive as against the government, and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal. In England this was originally done by *scire facias,* but a bill in chancery is found a more convenient remedy.

"Nor is fraud in the patentee the only ground upon which a bill will be sustained. Patents are sometimes issued unadvisedly or by mistake, and where the officer has no authority in law to grant them, or where another party has a higher equity and should have received the patent. In such cases courts of law will pronounce them void. The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. But one officer of the Land Office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court.

"It is claimed that the land for which a patent was granted to the appellant was reserved from sale for the use of the government, and consequently, that the patent is void. And although no fraud is charged in the bill, we have no doubt that such a proceeding in chancery is the proper remedy, and that if the allegations of the bill are supported, that the decree of the court below cancelling the patent should be affirmed."

This disposes of the contention of the appellant, that the decision of the officers of the land office is conclusive upon the issues of this case. The action

of the land office was taken wholly upon *ex parte* testimony; it even refused to allow a hearing to the persons seeking to make entries under the coal land laws. But aside from that, if the lands were in the class reserved from entry, the action of the land office officials was without authority of law and void. The Supreme Court of the United States in *Mullan v. U. S.*, 118 U. S. 271, used the following language:

"It is no doubt true that the actual character of the lands was as well known to the Department of the Interior as it was anywhere else, and that the secretary approved the lists, not because he was mistaken about the facts, but because he was of opinion that coal lands were not mineral lands within the meaning of the Act of 1853, and that they were open to selection by the State, but this does not alter the case. The list was certified without authority of law, and therefore was a mistake against which relief in equity may be afforded."

The vital point in this case, is whether the United States is entitled to relief as against the defendant corporation. We take the position that the patents having been issued through mistake and inadvertence and without any authority of law on the part of the officials of the United States who caused them to be

issued, that they are void, and that the defendant who bought these lands knowing that they were coal lands, and knowing that they had been acquired by homestead entries, was bound to inquire further, and that if it had inquired further, it could have ascertained the want of authority on the part of the Government officers to issue the patents, and the fraud on the part of the entrymen which vitiated them. The defendants acted through Mr. Smith, its agent, who had dealt wtih these lands as coal lands long prior to the homestead entry, and had so dealt with them for a period of six years. It is true that the rule laid down by the Supreme Court in the case of *Harrington vs. U. S.,* 11 Wall. 356, is the rule which must govern this court, which is:

"That the principal is not bound by knowledge communicated to the agent, unless it is present to the agent's mind at the time of effecting the purchase."

But whether it is so present in the agent's mind depends upon the circumstances of the case, and evidence as to what is, or is not, in an agent's mind, must necessarily be circumstantial. The circumstances surrounding this transaction must lead one to believe that the agent at the time of making this

purchase knew that this land had been known as coal land prior to the homestead entry. As Mr. Smith testified, purchase was made upon report of Mr. Hawkins, the civil engineer who made the examination prior to the purchase. Mr. Smith testified as follows: (Record, pp. 134, 135.)

"Braggs (Brooks) came back to me again, and in the meantime the Washington Securities Company was about to be formed and their stock was then being subscribed, and I referred Mr. Braggs to the Securities Company. He had a talk with Mr. Clise, who expected to be the president of the company and who was promoting it—forming it, and Mr. Clise discussed the question with me and Mr. Braggs, and I told him that—I gave him the name of an engineer, mining engineer, that would exploit the land, that is, would make examination, and that I knew nothing personally about the land myself, but would rely upon a report that this man would make; and, at my suggestion, the man was employed to go there and look the land over. After he had looked it over the matter of purchase was taken up between myself and Mr. Braggs and an option was taken for a sufficient length of time to enable us to verify the report of the engineer, and, upon the verification of those reports and the abstract of title, the land was purchased.

REDIRECT EXAMINATION.

Q. (Mr. Todd) You then bought the—you and the company then bought the land for coal land?

A. Yes, after the examination had been made, the report was satisfactory."

It therefore appears that the company and its agent thoroughly investigated the land prior to its purchase, and investigated the source of title. The Government is not claiming that the agent of the company personally knew the character of the land, but it does contend that the agent had knowledge that these lands had been known as coal land for many years, and that his knowledge was the knowledge of the defendant. But aside from that, the company itself at the time of the purchase from the entrymen, bought this land as coal land, knew it to be such, knew that it was more valuable for that than for any other purpose, and knew the source of title. The report of the engineer and the abstract of title are both in the possession of the defendant, and neither of them were produced by it at the hearing. What facts would be disclosed by the report of the engineer are not in evidence, but certainly must be conceded to be sufficient to put the company upon further inquiry as to the validity of the title.

The case of *U. S. v. Central Pacific R. Co.,* 84 Fed. 218, is directly in point. In that case the Government brought suit to cancel a patent to public lands, issued to the Central Pacific Railroad Company, on the ground that they were well known mineral lands, and therefore were excepted from the grant to that

company. The court held that the question to be determined was whether the land involved in the controversy was, or was not "known mineral land" prior to the issuance and delivery of the patent therefor, and held that the land was such. Some of the defendants urged that they were bona fide purchasers. As to that the court said:

"It appears from the allegations of the amended bill that these defendants hold contracts with the grantee company and its trustees to purchase from the latter the legal title to certain parts of section 27. The status of a bona fide purchaser is made up of three essential elements: (1) A valuable consideration; (2) absence of notice; and (3) the presence of good faith. 2 *Pom. Eq. Jur.* 745; *U. S. v. Winona & St. P. R. Co.*, 15 C. C. A. 96, 67 Fed. 948, 962. *I am of the opinion that these defendants had notice, actual or constructive, of the character of the land in section 27 which they contracted to buy from the grantee company and its trustees.* (Italics ours.) They were certainly chargeable with notice of the character of the land, for it had been occupied and known since 1850 as mineral land, and as being unfit for agricultural purposes. It was covered with evidences of mining claims and mining explorations. Notices of location affecting different portions of the section had been filed of record in the mining recorder's office of the Forks of the Butte mining district before the defendants entered into their contract to buy the land from the grantee company and its trustees, which was some time in 1885 and 1886. With respect to the defendants Jones and Gale, it appears further that the element of good faith is entirely wanting;

for Jones had, before acquiring any interest in the land he contracted to purchase, owned and worked a claim in the same part of this section, while Gale had, with others, filed a mining location upon the same land which he contracted to buy."

In *Mullan v. U. S.,* 118 U. S. 271, and *Western Pacific R. Co. vs. U. S.,* 108 U. S. 510, patents were set aside, although title was in purchasers from the original grantees, under circumstances which are similar to those in this case, where no fraud was alleged or claimed against the defendants themselves.

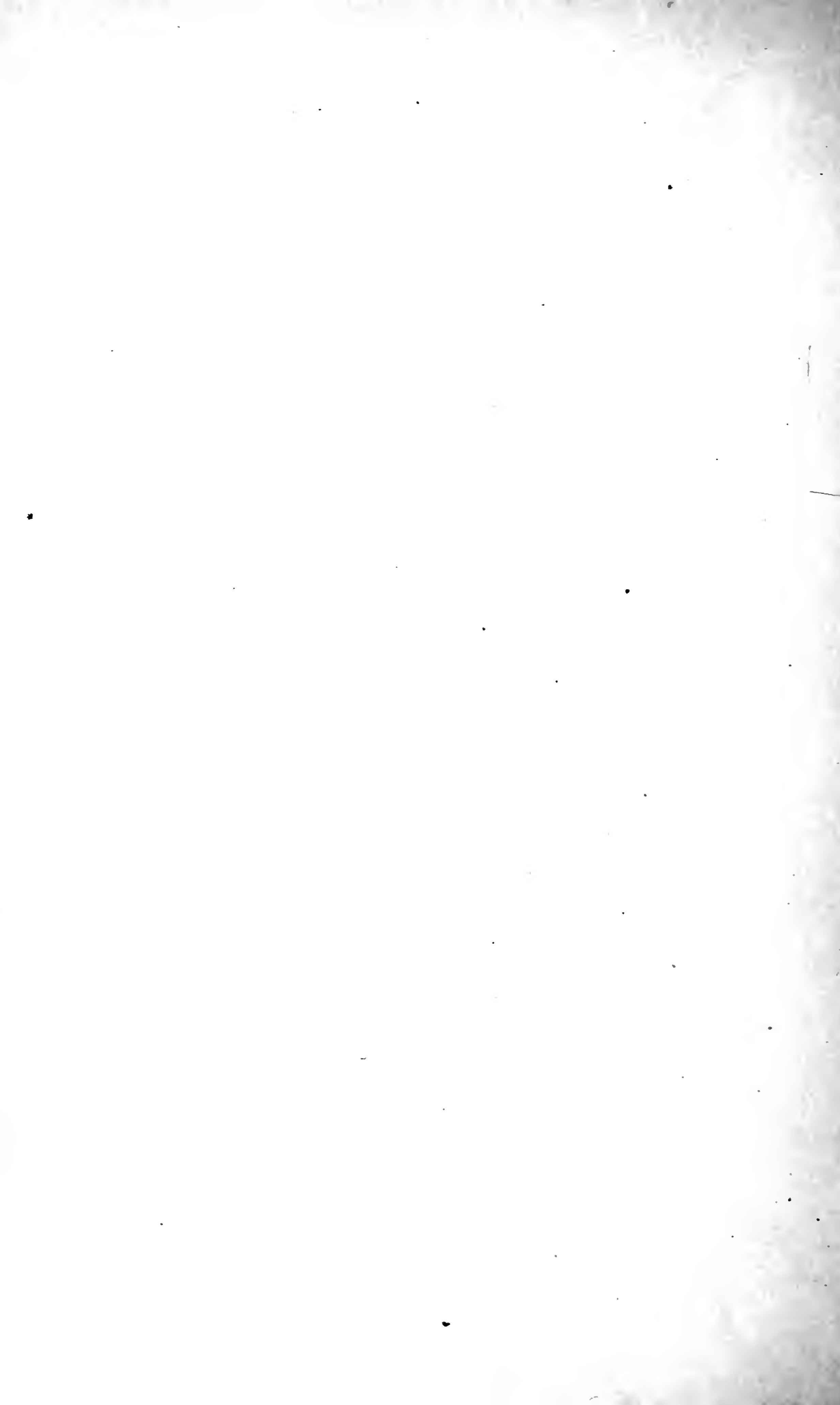
It seems to us that there can be no escape from the conclusion which the lower court reached:

"That the defendant at the time of purchasing the land, had actual knowledge that when the commutation entries were allowed, the land was known to be coal land and should have been sold as coal land only, to purchasers authorized by law to make entry of coal land in limited quantities as prescribed by law, and knew that the officers of the land office had contrary to their duty, allowed the entries and issued patents as if the land were rightfully classed as non-mineral land, and with that knowledge purchased the land from the patentees."

Even if defendant did not have such actual notice from the knowledge of its agent and from the report of its engineer, it certainly must be held that it had sufficient knowledge to put it upon inquiry, and that such inquiry would have revealed the true state of facts.

It is respectfully submitted that the judgment of the Circuit Court should be affirmed.

ELMER E. TODD,
United States Attorney.



No. 1989

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AMERICAN BONDING COMPANY of Baltimore, Maryland,
Appellant,

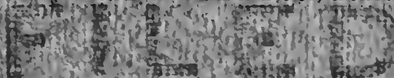
vs.

R. O. WELTS, NICK BESSNER, GEO. A. HENSON and W. J. HENRY,
Appellees.

TRANSCRIPT OF RECORD

Upon Appeal from the United States Circuit Court for the Western District of Washington, Northern Division.

Lowman & Hanford Co., Seattle



No.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AMERICAN BONDING COMPANY of Baltimore, Maryland,
Appellant,

vs.

R. O. WELTS, NICK BESSNER, GEO. A. HENSON and W. J. HENRY,
Appellees.

TRANSCRIPT OF RECORD

Upon Appeal from the United States Circuit Court for the Western District of Washington, Northern Division.

Lowman & Hanford Co., Seattle

INDEX.

	Page
Addresses of Counsel, Names and	1
Appeal Bond	30
Assignment of Errors	29
Bill of Complaint	2
Bill of Exceptions	21
Bond on Appeal	30
Certificate of Clerk U. S. Circuit Court to Record	34
Citation on Appeal	32
Complaint, Bill of	2
Counsel, Names and Addresses of	1
Demurrer to Bill	18
Exceptions, Bill of	21
Names and Addresses of Counsel	1
Order Allowing Appeal, etc., Petition for and	27
Order Certifying and Allowing Bill of Exceptions	25
Order Settling and Allowing Bill of Exceptions, etc.	26
Order Sustaining Demurrer and Dismissing Cause, etc.	20
Petition for Appeal and Order Allowing Appeal and Fixing Amount of Bond, etc.	27
Praecipe for Transcript	33
Stipulation Agreeing to and Approving Bill of Exceptions	25

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

AMERICAN BONDING COMPANY, of Baltimore, Maryland,
Complainant and Appellant,

vs.

R. O. WELTS, NICK BESSNER, GEO. A. HENSON and W. J. HENRY,
Defendants and Appellees.

No. 1886.

NAMES AND ADDRESSES OF COUNSEL.

F. S. BLATTNER, Esq.,
National Bank of Commerce Building, Tacoma, Washington.

L. B. da PONTE, Esq.,
General Headquarters N. P. Ry. Co., Tacoma, Washington.
Solicitors for Complainant and Appellant.

E. C. MILLION, Esq.,
Alaska Building, Seattle, Washington.

THOS. SMITH, Esq.,
Alaska Building, Seattle, Washington.

C. H. FARRELL, Esq.,
Central Building, Seattle, Washington.

J. H. KANE, Esq.,
Central Building, Seattle, Washington.

W. B. STRATTON, Esq.,
Central Building, Seattle, Washington.
Solicitors for Defendants and Appellees.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

AMERICAN BONDING COMPANY, of Baltimore, Maryland, *Complainant,* vs. R. O. WELTS, NICK BESSNER, GEO. A. HENSON and W. J. HENRY, *Defendants.*	No. 1886. In Equity.

To the Honorable Judges of the Circuit Court of the United States for the Western District of Washington, Northern Division:

The American Bonding Company, of Baltimore, Maryland, a citizen of the State of Maryland, domiciled in the City of Baltimore, State of Maryland, brings this, its bill of complaint, against R. O. Welts, Nick Bessner, Geo. A. Henson and W. J. Henry, residents and citizens of the State of Washington and of the Western District and Northern Division thereof. And thereupon your Orator complains and says:

I.

Your Orator is a corporation duly organized and existing under and by virtue of the laws of the State of Maryland for the purpose of doing a surety business for compensation, and has complied with all the laws of the State of Washington relating to foreign corporations, and is authorized and has a license to do business in said state.

II.

That the matters and things in controversy herein between complainant and defendants, and each of them, exceeds in

value, exclusive of interests and costs, the sum of $2,000.00, as will hereinafter more fully appear.

III.

Your Orator further alleges and shows to the Court that heretofore, to-wit, on the 4th day of November, A. D. 1902, one Fred Blumberg, at a general election held in Skagit County, Washington, was duly elected county auditor and ex-officio clerk of the board of county commissioners in and for said county, and as such county auditor the said Fred Blumberg was required by law to make and file a good and sufficient bond, the amount whereof was duly fixed at the sum of Ten Thousand ($10,000) Dollars. That thereafter on, to-wit, the 20th day of December, 1902, the said Fred Blumberg, as principal and this complainant as surety, made, executed and filed the official bond, conditioned as required by law, which is in words and figures as follows, to-wit:

"KNOW ALL MEN BY THESE PRESENTS: That we, Fred Blumberg, as principal, and the American Bonding Company, of Baltimore, Md., as surety, are held and firmly bound unto the State of Washington in the following penal sums, to-wit: the said, The American Bonding Company, of Baltimore, Md., in the penal sum of Ten Thousand & no-100 dollars, for which payment well and truly to be made we hereby bind ourselves, and our and each of our heirs, executors and administrators, jointly and severally, by these presents.

Signed with our hands and sealed with our seals this 20th day of December, 1902.

THE CONDITION of the above obligation is such that, whereas the above bounden Fred Blumberg was, on the fourth day of November, 1902, duly elected to the office of county auditor in and for Skagit County, State of Washington;

Now therefore, if the said Fred Blumberg shall well and truly perform all of the duties required of him by law as county auditor of Skagit County, Washington, aforesaid, and shall faithfully discharge all duties which may be required

of him by any law enacted subsequent to the execution of this bond, then this obligation shall be void, otherwise to remain in full force and effect.

(Signed) FRED BLUMBERG. (Seal)
AMERICAN BONDING COMPANY,
of Baltimore.
By CHARLES S. HILLS,
Its Attorney in Fact.

Signed and Sealed in Presence of
Wilbra Coleman, A. L. Krug as
to surety.
(Seal of A. B. Co.)

And thereafter, on, to-wit, the 23d day of December, 1902, said Fred Blumberg further qualified as county auditor by taking the oath of office prescribed by law, the same being printed on said bond as a part thereof, and the same is as follows, to-wit:

State of Washington,
County of Skagit.—ss.

I, Fred Blumberg, do solemly swear that I will support the Constitution and Laws of the United States, and the Constitution and Laws of the State of Washington, and that I will faithfully and impartially perform and discharge the duties of the office of county auditor in and for Skagit County, Washington, according to the best of my ability.

(Signed) FRED BLUMBERG.

Subscribed and sworn to before me this 23d day of December, 1902.

J. H. SMITH,
County Clerk and Clerk of the Superior Court, Skagit Co., Wash."

And thereafter said bond was duly approved and filed, as required by law, and the said Blumberg, having been so duly

elected and qualified, entered upon the performance of the duties of his office for the term to which he had been elected, to-wit, for the term commencing the 12th day of January, 1903, and ending on the 9th day of January, 1905.

IV.

Your Orator further complains and shows to the Court that at the time that said Fred Blumberg entered upon the discharge of his official duties the defendant, R. O. Welts, was duly elected, qualified and acting treasurer of said county, and so continued during the entire term of office of the said Fred Blumberg, to-wit, during all of the time between the 12th day of January, 1903, and the 9th day of January, 1905, and the other defendants were during all of said time the members of the board of county commissioners of said county, duly elected and qualified, and the said defendants during all of said time discharged the several duties of their respective offices.

V.

Your Orator further complains and shows to the Court that under and by virtue of the laws of the State of Washington it was the duty of Fred Blumberg, as county auditor, to issue warrants in payment of bills against the county when the same were approved by the said board of county commissioners, and he should be by said board directed and authorized so to do; and it was the duty of the defendant, R. O. Welts, as treasurer of said county, to pay such warrants when lawfully issued and presented to him therefor by the payees therein named, and at the same time to take up and cancel the warrants so paid, and to preserve and present the same to the board of county commissioners at the quarterly settlements whose duty it was to give said treasurer credit therefor, if found to be valid obligations of the county and he should be entitled thereto; and it was the duty of each and all of the other defendants, as members of the board of county commissioners, at the quarterly sessions on the first Monday in

January, April, July and October of each year, to check, examine, audit and pass upon the said warrants so paid and presented by said treasurer to said commissioners, and to allow to said treasurer credit for the warrants lawfully and properly paid by him, and for which said treasurer should be lawfully entitled to credit, and said defendants are expressly charged by law with the duty of auditing the accounts of all county officers having the care, management, collection or disbursement of county money, and are by law charged with the management of the county funds and business, and said defendants, as county commissioners, are required by law to examine and compare the accounts and statements of the county auditor and county treasurer, and to enter upon their records a statement of the receipts and expenditures of the preceding year, and are further required at their said quarterly sessions in January, April, July and October, to count the funds in the county treasury and ascertain that the same contains the proper amount of funds, and said commissioners are clothed by law with the duty of suprevising the affairs and business of the county, and have full power and authority to do any and all things, and to employ such assistance to that end, and to enable them efficiently and properly to discharge their official duties, as may be reasonably necessary therefor. That under the laws and statutes of the State of Washington the defendant, R. O. Welts, as treasurer, and his co-defendants, Nick Bessner, Geo. A. Henson and W. J. Henry, and Fred Blumberg, as commissioners and auditor of Skagit County, respectively, sustained to each other and to said county the relation of joint trustees of fiduciaries, being jointly and severally charged by law with the performance of duties connected with the proper disbursement and custody of the public funds, and under the laws of said state said officials are required to perform certain duties connected with the custody and preservation of said funds, as hereinbefore alleged, and to the end that each of said officers would be a check on and have supervision of the official acts and conduct

of his associates, and in the performance of their official duties each of them is made by law a check on all of the others, and a performance of the official duties imposed upon any one of said officers with ordinary care and diligence will always disclose any official misconduct that any of the other of said officers may be guilty of; and for the purpose of securing the performance of their duties, as aforesaid, each of said defendants executed an official bond in favor of said county, as required by law to do.

VI.

Your Orator further complains and alleges that during his said term of office said auditor, Fred Blumberg, issued certain warrants, a list whereof, together with the date, amount, date paid and payee, is as follows, to-wit:

CURRENT EXPENSE FUND WARRANTS.

Date 1903	Amount	Paid 1903	Payee
Mar. 12	$ 42	Mar. 13	C. R. Johnson
Mar. 14	32	Mar. 14	W. Jones
Apr. 15	22	Apr. 15	H. S. Smith
Apr. 15	32	Apr. 15	Thos. Larkin
May 14	22	May 15	Robt. R. Smith
May 15	15	June 1	Cedardale Lbr. Co.
June 6	119	June 8	S. F. Carlin
June 11	36	June 12	Jas. Buller
July 16	45	July 16	Peter Larsen
July 16	62	July 16	H. Laandstrom
July 20	42	July 22	F. M. Claghorn
Aug. 11	30	Aug. 11	Wm. Miller
Aug. 13	34	Aug. 17	E. J. Martin
Aug. 14	45	Sept. 17	Geo. Rowland
Sept. 11	62	Sept. 15	C. H. Wolf
Oct. 15	42	Oct. 15	F. J. Carlson
Oct. 15	62	Oct. 15	Geo. R. Small
Oct. 20	42	Oct. 21	A. C. Rogers
Nov. 11	68	Nov. 11	Frank M. Smith
Nov. 11	48	Nov. 11	Frank Watson

Date	Amount	Paid	Payee
1903		1903	
Nov. 14	54	Nov. 14	Rudolph Johnson
Nov. 14	60	Nov. 14	W. J. Johnson
Nov. 14	32	Nov. 20	D. R. Winch
Dec. 17	30	Dec. 17	C. R. Smith
Dec. 17	16	Dec. 17	Frank Bergman
Dec. 17	41	Dec. 17	Geo. Rowland
Dec. 19	32	Dec. 19	T. P. Jones
Dec. 19	62	Dec. 21	Geo. S. Daniels
Dec. 19	54	4-6-04	Samuel Thompson
Dec. 19	9.75	4-24-04	Pioneer Bindery
Dec. 19	60	4-6-04	P. R. Lee
1904		1904	
Jan. 5	23	Mar. 30	Fred Blumberg
Jan. 5	24	Mar. 30	John Magnussen
Jan. 16	21	Mar. 30	Geo. Walker
Feb. 3	18	Mar. 30	Elizabeth Murray
Feb. 6	28	Mar. 30	Frank Daniels
Feb. 11	32.50	Mar. 30	F. S. Wilson
Feb. 11	29	Mar. 30	W. S. Turner
Mar. 11	48	Mar. 30	Frank Buller
Mar. 15	45	Apr. 4	Frank Brown
Mar. 15	38	Mar. 23	Walter Hutton
Apr. 21	34	Apr. 23	Geo. L. Best
Apr. 21	18	Apr. 22	C. Von Pressentin
Not dated	22	Apr. 26	C. A. Mostrum
May 9	56	May 16	Ed C. Curry
June 18	38	June 18	C. F. Smith
July 19	16	July 23	C. E. Brandon
Aug. 12	16	Dec. 28	Frank Small
Aug. 12	32	Dec. 28	Edwin Johnson
Aug. 25	18	Dec. 28	C. J. Pillar
Sept. 17	18	Dec. 28	R. H. Sullivan
Total	$1,917.25		
Interest paid	$ 6.02		

ROAD DISTRICT WARRANTS.

Date	Amount	Paid	Payee
1903		1903	
Aug. 6	$ 32	Aug. 7	P. Large (Lange)
Mar. 5	22	Mar. 18	Geo. Hickson
May 12	19	June 8	Geo. Hickson
July 14	38	July 16	Jas. McKay
Mar. 7	63	Mar. 19	Patrick Ryan
Aug. 6	22	Aug. 7	Samuel Thompson
Mar. 5	32	Mar. 9	Jesse Cary
Mar. 7	16	Apr. 4	H. Davis
Apr. 14	54	Apr. 14	John Abrahamson
	$298.00		

ROAD DISTRICT WARRANTS (NEW) NO. 1.

1904		1904	
June 14	$ 48	June 23	A. W. Hall
Aug. 12	18	Aug. 19	Henry Olin
	$ 66.00		

ROAD DISTRICT WARRANTS (NEW) NO. 2.

1904		1904	
Mar. 10	$ 45	Mar. 10	Chas. Walker
Mar. 12	72	Mar. 12	Jas. Bennett (Geo)
Mar. 17	64	Mar. 29	Geo. W. Harpst
Apr. 14	63	Apr. 14	Frank Wolf
Apr. 14	82	Apr. 14	Frank Magnusen
May 4	118	May 7	Geo. C. Nelson
May 9	38	May 9	E. C. Gallup
May 9	47	May 9	G. F. Harding
June 6	62	June 6	Geo. Gallup
June 14	72	June 16	Chas. Harsch
June 14	15.75	June 23	Frank Hoadley
July 7	124	July 17	John Sather
July 12	48	July 13	F. J. McMillan
July 19	45	July 28	W. R. Miller
Aug. 6	58	Aug. 6	William Hoye
Aug. 12	27	Aug. 13	Geo. Bridgeman

ROAD DISTRICT WARRANTS (NEW) NO. 3.

Date	Amount
1904	
Mar. 12	$ 32
Apr. 21	31
May 9	24
June 14	36
July 7	160
Oct. 11	60
Dec. 8	47.50
	$390.50

VII.

That each and all of said warrants were issued by said Blumberg, as county auditor, wholly without authority of the board of county commissioners, or any other authority, and were not in payment of any bills, debts or obligations owed by Skagit County, but were so issued wrongfully and fraudulently by said Fred Blumberg, for his own use and benefit, and for the purpose of cheating and defrauding Skagit County. That having so wrongfully issued said warrants so payable on the face thereof to the parties therein named as payee, without the knowledge or consent of said payees, or any of them, said Fred Blumberg endorsed said warrants, and each of them, with the name of said payees respectively, by himself, Fred Blumberg, as county auditor, in substantially the following form, to-wit: "John Doe, by Fred Blumberg, County Auditor," and having so endorsed said warrants and each of them said auditor presented said warrants and collected the same from Skagit County, and the same, and each of them, were paid by defendant, R. O. Welts, as county treasurer, except that in some instances said Blumberg, having so wrongfully endorsed said warrants, negotiated and sold the same to other parties, and the same were by such parties, in good faith, presented to and paid by defendant, R. O. Welts, as county treasurer; and in so making payment

of said warrants said defendant, R. O. Welts, acted negligently and carelessly and without inquiry as to the validity of said warrants or the authority of said Blumberg so to endorse and sell or collect the same.

VIII.

That in addition to the aforesaid warrants so unlawfully issued and negotiated by the said Blumberg, he, said Fred Blumberg, as county auditor, being authorized and directed by the board of commissioners to do so, issued certain warrants in payment of certain obligations of Skagit County, and having so issued said warrants did thereafter fraudulently and wrongfully and wholly without authority forge and raise said warrants, as follows, to-wit:

Dist. No. 13, Warrant No. 87. Issued to H. C. Barkhousen. Correct amount $2.25. Raised to $12.25. Paid June 3d, 1903	$ 10
Road Dist. No. 18, Warrant No. 93. Issued to Jos. O. Byrne. Correct amount $4. Drawn for $24.00. Paid June 3, '03. Raised	20
Current Expense Fund. Warrant No. 9252 to Fred Blumberg. Correct amount $9.85. Drawn for $19.85. Paid May 9, 1904. Raised	10
Same to W. J. Donnelly No. 9267. Correct amount $33.60. Issued for $36.60. Paid May 19, 1904. Raised	3
Same to Fred Blumberg No. 9912. Correct amount $19.80. Issued for $31.25. Paid Oct. 15, 1903. Raised	11.45
Same to Fred Blumberg, No. 10049. Correct amount $6.05. Drawn for $14.05. Paid Nov. 4th, 1903. Raised	8.00
Same, No. 10624, to Fred Blumberg. Correct amount $7.15. Drawn for $17.75. Paid Mar. 30, 1904. Raised	10.00

Same, No. 10894. Correct amount $23.06. Issued for $33.06. Paid Mar. 30, 1904. Raised..............	10.00
Same, No. 11848, to Argus Pub. Co. Correct amount $26.10. Issued for $66.00. Paid Sept. 9th, 1904. Raised	40.00
Total	$122.45

And having wrongfully forged and raised said warrants, said Fred Blumberg wrongfully and fraudulently endorsed and obtained the money thereon, as alleged with respect to the warrants hereinbefore set out, and the same, and each of them, were presented to and paid by defendant R. O. Welts, wholly without inquiry or examination thereof, and in so doing said defendant, R. O. Welts, was guilty of negligence and carelessness, as hereinbefore alleged.

IX.

Your Orator further complains and alleges that during the term of office of said Fred Blumberg the board of county commissioners was engaged in negotiations for the purchase of right of way for a certain county road, and in pursuance thereof authorized the issuance of a certain warrant, dated Jany. 19th, 1903, for $30.00, payable to Geo. W. Jones, but said negotiations fell through and were never consummated, and it then became the duty of said Blumberg to cancel said warrant, but in violation of his duty he endorsed and negotiated said warrant and obtained the money thereon, and said warrant was, on June 16th, 1903, paid by defendant, R. O. Welts; and in so doing said defendant was guilty of negligence and carelessness, as hereinbefore alleged with respect to the other warrants above described.

X.

Your Orator further complains and alleges that in accordance with the laws and statutes of the State of Washington and his official duty as county treasurer, defendant R. O.

Welts presented to the defendants, as county commissioners, the aforesaid warrants so paid by him, as aforesaid, together with a list of the same itemized and detailed as provided by law, on the first Monday in the months of January, April, July and October, being the dates of the several quarterly sessions of said defendants as county commissioners, and included in said warrants and lists all of the warrants so paid by him, as aforesaid, during the preceding quarter, and it then and there became and was the official duty of said defendants, as members of said board, to carefully check, audit and examine said warrants and lists for the purpose of ascertaining that the same were valid obligations of Skagit County for which defendant treasurer was entitled to receive credit, but said defendant commissioners wholly failed and omitted to discharge their official duty in that regard, and negligently and carelessly and in violation of their official duty, passed said fraudulent warrants without examining the same, and allowed credit therefor to defendant treasurer, although any, even the most perfunctory, discharge of their official duty, as aforesaid, would inevitably have resulted in a discovery and full disclosure of the fraudulent and fictitious nature of said warrants, and all of them, at a date not later than the date of the first quarterly session held by said board, to-wit, not later than the first Monday of April, 1903, at which time many of said fictitious warrants were presented to said board and could and should have been detected by them and the fraud and dishonesty of the said Fred Blumberg discovered and further misconduct prevented, and in consequence of the misconduct and breach of his official duties by defendant, R. O. Welts, and defendants Bessner, Henson and Henry, said Blumberg was enabled to continue his wrongful conduct and fraudulent misappropriation of the funds of Skagit County throughout his entire term, to the great loss of Skagit County as aforesaid. That said defendants never at any time undertook or made any effort to perform their official duty of auditing the accounts of said Fred Blumberg, or said defendant

treasurer, or either of them, although the books, papers, vouchers and all necessary information was at all times on file in the proper place and accessible to them, and each of them, and any, even the most perfunctory examination thereof and discharge of their official duty would have resulted in a full disclosure of the fraud and misconduct of said auditor and treasurer, as aforesaid.

XI.

Your Orator further complains and alleges that on or about the 4th day of June, 1903, one Frank Nixon made application to said defendant commissioners for a retail liquor license, and paid to said Fred Blumberg the fee therefor in the sum of $300.00, but said Blumberg fraudulently procured from defendant Welts, with his knowledge and consent, a receipt issued by Skagit County to said Nixon for his license fee for the year 1902, and altered said receipt so as to appear that the same was issued for the year 1903, and presented said receipt with the application of said Nixon for a liquor license to defendant commissioners, and said defendants thereupon granted said application, and the same was duly issued. That in so granting said application said defendants were guilty of gross negligence and breach of their official duties in that they wholly failed and omitted to make any examination of said forged and altered receipt, although had any, even the most casual examination thereof been made, the alteration thereof would have been apparent and immediately discovered, and in so permitting and co-operating with said Blumberg in changing and altering said receipt said defendant, Welts, was guilty of a breach of his official duties, and said commissioners were likewise guilty of negligence and a breach of their official duties, and said Blumberg, in issuing the license for the year 1903, knowing that the fee therefor had not been paid, was also guilty of a breach of his official duties, as county auditor and clerk of the board of commissioners, and having embezzled and converted said sum of $300.00 to his own use, thereby deprived Skagit County thereof, to its damage in the sum of $300.00.

XII.

Your Orator further complains and alleges that at the expiration of his term of office, on January 9th, 1905, said Fred Blumberg was re-elected county auditor for a second term, ending in January, 1907, and continued his fraudulent conduct and peculations throughout said term, and at the expiration thereof he went out of office, and in the month of February, 1907, said Blumberg committed suicide, being then and there wholly insolvent, and thereupon his defalcations were discovered, and an action at law was commenced by Skagit County against complainant as surety on the aforesaid official bond of said Blumberg, and against Allen Blumberg, administratrix of the estate of said Fred Blumberg, and thereafter such proceedings were had in said cause that Skagit County recovered a judgment against complainant, as such surety, in the sum of many thousands of dollars, including each and all of the various items hereinbefore set out, together with interest and costs, and thereafter, in due time, complainant took an appeal from said judgment to the Supreme Court of the State of Washington, said appeal being entitled "Skagit County, Respondent, vs. American Bonding Company, Appellant," on the docket of said Supreme Court, and thereafter, on the 10th day of June, 1910, the Supreme Court of this state rendered an opinion affirming the judgment of the Court below in all particulars, and thereby the same became final, and in due time thereafter the mandate and remittitur was sent down from the Supreme Court to the Superior Court of the State of Washington in and for Skagit County, and judgment was duly entered in favor of Skagit County and against complainant in the full sum and amount of, to-wit, $8,637.00, and thereafter, to-wit, on the 25th day of July, 1910, complainant was forced to and did pay off, satisfy and discharge said judgment by paying to Skagit County the full amount thereof, interest and costs.

XIII.

Your Orator, further complaining, alleges that by and

through the aforesaid negligence and breach of their official duties by defendants, R. O Welts, as county treasurer, and defendants Nick Bessner, Geo. A. Henson and W. J. Henry, as members of the board of county commissioners, and the breach and violation by said defendants, and each of them, of the terms and obligations of their official bonds, conditioned as required by the laws and statutes of this state, Skagit County had a cause of action against them, and each of them, for the recovery of the sums of money hereinbefore set out in detail, and each and every item thereof, as well as and in addition to the cause of action asserted against said Fred Blumberg, auditor and ex-officio clerk of the said board of commissioners, and said defendants, and each of them, were equally liable with said auditor, and said County of Skagit, having elected to proceed against said auditor and this complainant, as surety on his official bond, instead of proceeding against said defendants, and each of them, and complainant, a wholly innocent third party, having been thereby forced and compelled to pay off and satisfy the aforesaid claim of said county, became, was and is subrogated to all and singular, the rights and remedies so held by said county against these defendants, and each of them, by reason of the matters and things hereinbefore alleged, and by reason of having involuntarily paid off, satisfied and discharged an obligation for which said defendants, and each and all of them, were primarily liable to said county.

XIV.

Your Orator, further complaining, alleges that, having so paid off, satisfied and discharged the aforesaid judgment in favor of Skagit County, and prior to the commencement of this action, made demand in writing on the defendants, and each of them, for the aforesaid sum of money, but the defendants, and each of them, have failed, neglected and refused to comply with said demand in whole or in part, and said sum is still due and unpaid.

XV.

To the end, therefore, that your Orator may have that relief which he can only obtain in a court of equity, and that said defendants, and each of them, may answer the premises, but not upon oath or affirmation, an answer under oath being hereby expressly waived by your Orator, it now prays the Court that it have judgment against the defendants, and each of them, jointly and severally, for the aforesaid sum of money, to-wit, the sum of $3,007.27. And that your Orator may have such other relief or further relief in the premises as the nature of the circumstances of the case may require.

And it may please your Honors to grant to your Orator a writ of subpoena to be directed to the said Nick Bessner, Geo. A. Henson, W. J. Henry and R. O. Welts, thereby commanding them, and each of them, at a certain time and under a certain penalty therein to be limited, personally to appear before this Honorable Court and then and there full, true, direct and perfect answers make to all and singular the premises, and to stand, perform and abide by such order, direction and decree as may be made against him in the premises, as shall seem meet and agreeable to equity. And so your Orator will ever pray.

F. S. BLATTNER,
Solicitor for Complainant.
American Bonding Company, of Baltimore, Maryland.

State of Washington,
County of Pierce.—ss.

L. N. Hanson, being sworn, says that he is the agent for the American Bonding Company, of Baltimore, Md., and authorized to make this affidavit; that said corporation is a nonresident of this state; that he has read the foregoing bill of complaint, knows the contents thereof, and the matters and things therein stated are true.

L. N. HANSEN.

Sworn to and subscribed before me this the 11th day of August, 1910.

(Seal) F. S. BLATTNER,
Notary Public, Pierce County, Washington.

Endorsed: Bill of Complaint. Filed U. S. Circuit Court, Western District of Washington, Aug. 12, 1910, A. Reeves Ayres, Clerk, W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

AMERICAN BONDING COMPANY, of Baltimore, Maryland,
Complainant,
vs.
R. O. WELTS, NICK BESSNER, GEO. A. HENSON and W. J. HENRY,
Defendants.

No. 1886.
Demurrer.

To the Honorable Judges of the Circuit Court of the United States for the Western District of Washington, Northern Division:

The joint and several demurrer of R. O. Welts, Nick Bessner, Geo. A. Henson and W. J. Henry, defendants above named, to the bill of the above named plaintiff;

Each of these defendants respectively by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiff's bill to be true, in such manner and form as same are therein set forth and alleged, doth respectfully demur thereto, and for cause of demurrer showeth:

1. That the said plaintiff has not in and by the said bill made or stated any such cause as doth or ought to entitle him to any such relief as is thereby sought and prayed for from or against these defendants respectively.

2. That the suit has not been commenced within the time limited by law and is barred by the statute of limitations.

Wherefore, and for divers other good causes of demurrer appearing in said bill, these defendants respectively demur thereto and humbly demand the judgment of this Court, whether he shall be compelled to make any further or other answer to the said bill, and prays to be dismissed with his costs and charges in this behalf, most wrongfully sustained.

FARRELL, KANE & STRATTON,
Solicitors for Defendants.

Western District of Washington,
Northern Division,
County of Skagit.—ss.

R. O. Welts, Nick Bessner, Geo. A. Henson and W. J. Henry, each for himself and not one for the other, makes solemn oath and says: that he is one of the above named defendants, and that the foregoing demurrer is not interposed for delay.

R. O. Welts.
NICK BESSNER.
GEO. A. HENSON.
W. J. Henry.

Subscribed and sworn to before me as to Geo. A. Henson, this 2nd day of November, 1910.

(Seal) PERCY LIVESEY,
Notary Public in and for the State of Washington, residing at Bellingham.

Subscribed and sworn to before me as to R. O. Welts, Nick Bessner and W. J. Henry, this 4th day of November, 1910.

(Seal) THOMAS SMITH,
Notary Public in and for the State of Washington, residing at Mt. Vernon.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

W. B. STRATTON,
Of Counsel for Defendants.

Endorsed: Demurrer. Filed U. S. Circuit Court, Western District of Washington, Dec. 12, 1910, Sam'l D. Bridges, Clerk, W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

AMERICAN BONDING COMPANY, of Baltimore, Maryland,
Complainant,
vs.
R. O. WELTS, NICK BESSNER, GEORGE A. HENSON and W. J. HENRY,
Defendants,

No. 1886.
In Equity.

ORDER SUSTAINING DEMURRER AND DISMISSING SUIT.

This matter heretofore came on regularly to be heard in open Court on the 16th day of January, 1911, upon the separate demurrer of the said defendants, and each of them, to the bill of complaint herein, the complainant being represented by its attorneys, F. S. Blattner and L. B. da Ponte, and the defendants being represented by their attorneys, Farrell, Kane & Stratton; the Court having listened to argument upon said demurrer, and the Court being fully advised in the premises and having duly considered the same, did sustain said demurrer as to each and all of said defendants, to which order

and ruling the said complainant excepted and its exception was and is allowed. Thereupon the said complainant announced in open court that it refused to plead further, whereupon, on motion of the defendants the said cause was and is hereby dismissed with costs to the defendants, to which order and ruling the complainant excepts, and its exception is allowed. And upon application of complainant, defendants consenting, it is ordered that complainant have 90 days in which to prepare and settle a Bill of Exceptions.

Done in open court this 6th day of February, 1911.

C. H. HANFORD, Judge.

Endorsed: Order Sustaining Demurrer and Dismissing Suit. Filed U. S. Circuit Court, Western District of Washington, Feb. 6, 1911, Sam'l D. Bridges, Clerk, W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

AMERICAN BONDING COMPANY, of Baltimore, Maryland,
Complainant,

vs.

R. O. WELTS, NICK BESSNER, GEO. A. HENSON and W. J. HENRY,
Defendants.

No. 1886.
In Equity.

BILL OF EXCEPTIONS.

This is a suit in equity commenced by complainant, the American Bonding Company, to recover a joint and several

judgment against the defendants in the sum of more than three thousand dollars.

Complainant is a surety company organized under the laws of the State of Maryland, and authorized to do a surety business in the State of Washington, and the defendants are citizens of the State of Washington, and of the Western District and Northern Division thereof.

The bill of complaint alleges that on or about the 4th day of November, 1902, one Fred Blumberg was elected county auditor and ex-officio clerk of the board of commissioners of Skagit County, Washington, and executed an official bond in the sum of $10,000 with complainant as surety, and having duly qualified entered upon the discharge of his official duties for the term to which he had been elected, commencing the 12th day of January, 1903, and ending the 9th day of January, 1905.

That defendant, R. O. Welts, was the country treasurer, and defendants Nick Bessner, Geo. A. Henson and W. J. Henry were the county commissioners, of Skagit County during Blumberg's said term, and had qualified by giving the official bond required by law.

It is next alleged that Blumberg, as auditor, issued a large number of fictitious and fraudulent warrants, a detailed list whereof is set out in the bill of complaint, made payable to the respective payees named in the respective warrants, and having so wrongfully issued the warrants, he endorsed the same with the name of the payee of each warrant in substantially the following form, viz., "John Doe by Fred Blumberg, County Auditor," and thereupon presented said warrants to defendant R. O. Welts, county treasurer, and the same were paid, except that in some instances the warrants were marked "presented, but not paid for want of funds," and were thereupon sold by Blumberg to innocent third parties, who afterwards presented and received payment of said warrants from defendant R. O. Welts.

And it is alleged in the bill of complaint that in so paying

said fraudulent warrants defendant R. O. Welts was guilty of gross negligence, and acted wholly without inquiry or investigation as to the genuineness of the same or the authority of Blumberg to endorse the name of the several payees, or to collect the same, and thereby Skagit County was defrauded of the amounts so paid on said warrants.

The connection of defendant commissioners may be briefly stated as follows:

It is alleged that by virtue of the laws of Washington the warrants so paid by the treasurer were listed in detail, and presented with the said list to the commissioners at each quarterly session on the first Monday of January, April, July and October by the treasurer, and it then became and was the duty of the commissioners to carefully examine and check the said warrants and lists with a view of allowing the treasurer credit for all proper and valid warrants; and various other statutory duties of the commissioners are referred to, all of them having for their object a careful check and audit by the commissioners of the accounts of all county officers having the care, custody or disbursement of any money of the county. But, it is alleged, the commissioners wholly failed to discharge their statutory duties in this behalf, although even the most casual and perfunctory performance of the same would have resulted in a full discovery of Blumberg's fraudulent practices as early as the first quarterly meeting of the commissioners in January, 1903, at which time a number of the fictitious warrants came before them with the treasurer's detailed list, and as the consequence of their dereliction of duty Blumberg was enabled to and did continue to issue and forge many other warrants, described in the complaint, and thereby the county lost the amounts paid thereon.

It is next alleged that Blumberg was re-elected to a second term, ending in January, 1907, during which he continued his peculations, and at the expiration thereof he went out of office, and in February, 1907, he committed suicide, and his defalcations were discovered, and thereupon Skagit County com-

menced an action against complainant, as surety, and such proceedings were had that on the 10th day of June, 1910, judgment was rendered by the Supreme Court of Washington against complainant in the sum of many thousands of dollars, including the sum of the warrants described in the bill of complaint, and Blumberg's estate being insolvent, complainant was forced to and did discharge said judgment by paying the full amount thereof, interest and costs.

It is next alleged that in consequence of the breach by defendants of their official duties and of the terms of their several official bonds, and their negligence and dereliction of duty, Skagit County had a cause of action against them, and each of them, as well as and in addition to the cause of action against Blumberg, and that defendants, and each of them, were jointly liable with Blumberg to Skagit County, and that Skagit County, having elected to proceed against Blumberg, and complainant, as Blumberg's surety, having been forced to discharge an obligation for which defendants were primarily liable, is equitably subrogated to all and singular the rights and remedies of Skagit County against the defendants, and judgment is prayed for against each of the defendants accordingly, demand having been made and refused.

The foregoing is a brief summary of the allegations of the bill, which is somewhat lengthy, and for full particulars reference is made thereto as a part of this bill of exceptions.

To the bill of complaint defendants filed a demurrer, on two grounds, (1) that the cause of action was barred by limitation; and (2) that no facts were stated constituting a cause of action.

For further particulars reference is made to the demurrer accompanying the record herein.

The said demurrer came on regularly for argument on the 16th day of January, 1911, before the Honorable C. H. Hanford, Judge, and thereupon there appeared for complainant, Messrs. L. B. da Ponte and F. S. Blattner, and for defendants, Messrs. Farrell, Kane & Stratton, as their solicitors;

and thereupon the cause was fully argued, and the Court having heard and considered said arguments, sustained said demurrer, and thereafter, on the 6th day of February, 1911, an order was entered herein accordingly, and complainant refusing to plead further, said cause was dismissed at complainant's cost, all of which will more fully appear by reference to said order made a part of the record herein, to all of which complainant duly excepted and was allowed an exception.

And now, in furtherance of justice and that right may be done, complainant presents the foregoing as its bill of exceptions in this cause, and prays that the same may be settled, allowed, signed and certified by the judge, as provided by law; and the Court does hereby sign, seal and allow the same.

L. B. da PONTE, F. S. BLATTNER,
Solicitors for Complainant,
American Bonding Company.

We have examined and do hereby agree to and approve the foregoing bill of exceptions as a true and correct bill of exceptions for use on the appeal of this cause.

FARRELL, KANE & STRATTON,
Solicitors for Defendants.

Signed, certified and allowed.

C. H. HANFORD, Judge.

Endorsed: Bill of Exceptions. Filed U. S. Circuit Court, Western District of Washington, Mar. 2, 1911, Sam'l D. Bridges, Clerk, W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

AMERICAN BONDING COMPANY, of Baltimore, Maryland, *Complainant,*

vs.

R. O. WELTS, NICK BESSNER, GEO. A. HENSON and W. J. HENRY, *Defendants.*

No. 1886.

In Equity.

ORDER SETTLING BILL OF EXCEPTIONS.

This cause having been brought on regularly before the Court on the application of complainant for the settling and certifying of its proposed bill of exceptions, and the time therefor having been duly extended by order of the Court and stipulation of the parties to and including this date; and the parties having agreed together with respect to said bill of exceptions as now presented to me; and it appearing that said bill of exceptions is a true and correct bill of exceptions;

It is ordered that said bill of exceptions heretofore filed, as now presented and agreed to by counsel, be and is hereby settled and allowed as the true bill of exceptions in this cause, and that the same be now certified and settled accordingly by the undersigned Judge of this Court who presided at the trial of this cause, and that said bill of exceptions so certified be filed with the clerk.

Done in open court this 2nd day of March, 1911.

C. H. HANFORD, Judge.

Endorsed: Order settling Bill of Exceptions. Filed U. S. Circuit Court, Western District of Washington, Mar. 2, 1911, Sam'l D. Bridges, Clerk, W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

AMERICAN BONDING COMPANY, of Baltimore, Maryland,
Complainant,
vs.
R. O. WELTS, NICK BESSNER, GEO. A. HENSON AND W. J. HENRY,
Defendants.

No. 1886.
In Equity.

PETITION AND ORDER.

The above named complainant, American Bonding Company, of Baltimore, conceiving itself aggrieved by the order and decree made and entered in the above cause on the .... day of February, 1911, wherein and whereby the demurrer of the defendants to the bill of complaint was sustained, and complainant's said bill dismissed at its cost, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from said order and decree, and as grounds therefor herewith presents and files an assignment of the errors on which it will rely for a reversal of said order and decree on this appeal.

And complainant respectfully prays that its petition for appeal may be allowed, and that a transcript of the record and proceedings on which said order and decree was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

Dated the 2nd day of March, 1911.

F. S. BLATTNER, L. B. da PONTE,
Solicitors for American Bonding Company, of Baltimore, Maryland.

ORDER ALLOWING APPEAL AND FIXING BOND.

On motion of L. B. da Ponte, solicitor for complainant, the American Bonding Company, it is ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final order and decree heretofore entered herein, sustaining defendants' demurrer to complainant's bill of complaint, and dismissing said bill with costs to defendants, be and the same is hereby allowed, and that a certified copy of the record, stipulations and proceedings herein be forthwith transmitted to said United States Circuit Court of Appeals for further proceedings therein as prescribed by law.

It is further ordered that the bond on appeal herein be and is hereby fixed at the sum of $500.00, conditioned as required by law.

In testimony whereof witness the signature of the Honorable C. H. Hanford, Judge of this Court, hereto affixed this 2nd day of March, 1911.

C. H. HANFORD, Judge.

Endorsed: Petition and Order. Filed U. S. Circuit Court, Western District of Washington, Mar. 2, 1911, Sam'l D. Bridges, Clerk, W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

AMERICAN BONDING COMPANY, of Baltimore, Maryland, *Complainant,* vs. R. O. WELTS, NICK BESSNER, GEO. A. HENSON and W. J. HENRY, *Defendants.*	No. 1886. In Equity.

ASSIGNMENT OF ERRORS.

Comes now the complainant, American Bonding Company, of Baltimore, Md., and files the following assignment of the errors on which it will rely on the appeal of this cause.

I.

The Honorable Circuit Court erred in sustaining the demurrer of the defendants.

II.

The Honorable Circuit Court erred to the prejudice of complainant in dismissing its bill of complaint herein with costs to defendants.

Wherefore complainant prays for a reversal of said order and judgment of the Circuit Court.

L. B. da PONTE, F. S. BLATTNER,
Solicitors for Complainant, American Bonding Company.

Endorsed: Assignment of Errors. Filed U. S. Circuit Court, Western District of Washington, Mar. 2, 1911, Sam'l D. Bridges, Clerk, W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

AMERICAN BONDING COMPANY, of Baltimore, Maryland, *Complainant,* vs. R. O. WELTS, NICK BESSNER, GEO. A. HENSON and W. J. HENRY, *Defendants.*	No. 1886. In Equity.

APPEAL BOND.

KNOW ALL MEN BY THESE PRESENTS, that we, the American Bonding Company, of Baltimore, Md., a corporation, as principal, and the other subscribers hereto, as sureties, are held and firmly bound unto R. O. Welts, Nick Bessner, Geo. A. Henson and W. J. Henry, defendants, in the full and just sum of Five Hundred ($500.00) Dollars, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 1st day of March, 1911.

Whereas, at a session of the Circuit Court of the United States for the Western District of Washington, Northern Divission, in a suit in equity pending in said court between the American Bonding Company, of Baltimore, as complainant, and R. O. Welts, Nick Bessner, Geo. A. Henson and W. J. Henry, as defendants, a decree dismissing complainant's bill of complaint was rendered, and complainant having obtained from said Court an order allowing an appeal to the United States Circuit Court of Appeals to reverse said decree, and a citation directed to said R. O. Welts, Nick Bessner, Geo. A. Henson and W. J. Henry is about to be issued, citing and admonishing them to be and appear at the United States Cir-

cuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, California.

Now the condition of this obligation is such that if the said American Bonding Company, of Baltimore, Md., shall prosecute its said appeal with effect, and shall answer all damages and costs that may be awarded against it, if it fails to make its plea good, then this obligation to be void, otherwise to remain in full force and virtue.

Dated the 1st day of March, 1911.

AMERICAN BONDING COMPANY,
of Baltimore, Md., Principal.
By L. N. HANSEN, (Seal)
Its Agent and Attorney Thereunto Lawfully Authorized.

UNITED STATES FIDELITY & GUARANTY CO.,
J. C. STANTON, (Seal)
Its Attorney in Fact.

Examined and approved the 2nd day of March, 1911.

C. H. HANFORD, Judge.

Endorsed: Bond: Filed U. S. Circuit Court, Western District of Washington, Mar. 2, 1911, Sam'l D. Bridges, Clerk, W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

AMERICAN BONDING COMPANY, of Baltimore, Maryland, *Complainant,* vs. R. O. WELTS, NICK BESSNER, GEO. A. HENSON and W. J. HENRY, *Defendants.*	No. 1886. In Equity.

CITATION.

The President of the United States to R. O. Welts, Nick Bessner, Geo. A. Henson and W. J. Henry, and to Farrell, Kane & Stratton, Their Attorneys of Record, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at San Francisco, California, within thirty days from date of this Writ, pursuant to an appeal filed in the office of the Clerk of the United States for the Western District of Washington, Northern Division, wherein the American Bonding Company, of Baltimore, Md., is appellant, and R. O. Welts, Nick Bessner, Geo. A. Henson and W. J. Henry are appellees, then and there to show cause, if any you have, why the order and decree in said appeal mentioned should not be corrected, and speedy justice done to the parties in that behalf.

Witness the Honorable Edw. D. White, Chief Justice of the Supreme Court of the United States, this 2nd day of March, 1911.

C. H. HANFORD,
U. S. District Judge Presiding in the Circuit Court.

(Seal)

SAM'L D. BRIDGES,
Clerk Circuit Court.
By W. D. COVINGTON, Deputy.

Service of the within and foregoing citation, and receipt of copy thereof, and of copy of the petition for appeal, order allowing, assignment of errors and bond, is hereby admitted this 2nd day of March, 1911.

FARRELL, KANE & STRATTON,
Solicitors for Defendants.

Endorsed: Citation. Filed U. S. Circuit Court, Western District of Washington, Mar. 3, 1911, Sam'l D. Bridges, Clerk, W. D. Covington, Deputy.

United States Circuit Court, for the Western District of Washington.

AMERICAN BONDING CO.,
Complainant,
vs.
R. O. WELTS, ET AL.,
Defendants.
No. 1886.

PRAECIPE FOR TRANSCRIPT.

To the Clerk of the Above Entitled Court:

You will please prepare Transcript of Record for appeal and include following:

Complaint, Demurrer, Order Sustaining Demurrer, Bill of Exceptions, Order Settling Bill, Petition for Appeal and Order, Assignment of Errors, Bond, Citation.

L. B. DA PONTE,
Attorney for Complainant.

Endorsed: Praecipe for Transcript. Filed U. S. Circuit Court, Western District of Washington, Mar. 2, 1911. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

AMERICAN BONDING COMPANY, of Baltimore, Maryland,
Complainant and Appellant,

vs.

R. O. WELTS, NICK BESSNER, GEO. A. HENSON and W. J. HENRY,
Defendants and Appellees.

No. 1886.

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington.—ss.

I, SAM'L D. BRIDGES, Clerk of the Circuit Court of the United States for the Western District of Washington, do hereby certify the foregoing 35 printed pages, numbered from 1 to 35, inclusive, to be a full, true and correct copy of the record and proceedings in the above and foregoing entitled cause, as the same is called for by praecipe of solicitors for complainant and appellant, as the same remain of record and on file in the office of the Clerk of the said Court, and that the same constitutes the record on appeal from the order, judgment and decree of the Circuit Court of the United States, for the Western District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit.

I further certify that I hereto attach and herewith transmit the Original Citation issued in this cause.

I further certify that the cost of preparing and certifying

the foregoing record on appeal is the sum of $53.10, and that the said sum has been paid to me by L. B. da Ponte, Esq., and F. S. Blattner, Esq., solicitors for complainant and appellant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Circuit Court at Seattle, in said District, this 28th day of April, 1911.

(Seal) SAM'L D. BRIDGES, Clerk.
By W. D. COVINGTON, Deputy.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AMERICAN BONDING COMPANY, of Baltimore Maryland, *Appellant,* vs. R. O. WELTS, NICK BESSNER, GEO. A. HENSON and W. J. HENRY, *Appellees.*	1989
AMERICAN BONDING COMPANY, of Baltimore, Maryland, *Appellant,* vs. PATRICK HALLORAN, GEO. A. HENSON, R. M. MOODY and JAMES DUNLAP, *Appellees.*	1990
AMERICAN BONDING COMPANY, of Baltimore, Maryland, *Appellant,* vs. GEO. A. HENSON, R. M. MOODY and JAMES DUNLAP, *Appellees.*	1991

CONSOLIDATED CAUSES.

On Appeal From the United States Circuit Court for the Western District of Washington, Northern Division.

HON. C. H. HANFORD, District Judge.

Appellant's Brief

F. S. BLATTNER,
L. B. da PONTE,
Solicitors for Appellant, American Bonding Company.

PRESS OF PUYALLUP VALLEY TRIBUNE

FILED

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AMERICAN BONDING COMPANY, of Baltimore Maryland,
Appellant,
vs.
R. O. WELTS, NICK BESSNER, GEO. A. HENSON and W. J. HENRY,
Appellees.

AMERICAN BONDING COMPANY, of Baltimore, Maryland,
Appellant,
vs.
PATRICK HALLORAN, GEO. A. HENSON, R. M. MOODY and JAMES DUNLAP,
Appellees.

AMERICAN BONDING COMPANY, of Baltimore, Maryland,
Appellant,
vs.
GEO. A. HENSON, R. M. MOODY and JAMES DUNLAP,
Appellees.

CONSOLIDATED CAUSES.

On Appeal From the United States Circuit Court for the Western District of Washington, Northern Division.
HON. C. H. HANFORD, District Judge.

Appellant's Brief

STATEMENT OF THE CASE.

These appeals are from orders sustaining appellees' demurrers to appellant's bills of complaint in the three cases, and dismissing the same at appellant's cost.

Appeals from the several orders having been perfected, counsel entered into a stipulation that the causes might be consolidated in this court, submitted on one brief and argued together at the September term to be holden in the City of Seattle, and the court has so ordered.

The bill of complaint in the Halloran case (omitting the jurisdictional averments), may be conveniently summarized as follows:

It is averred that on the 8th day of November, A. D. 1904, at a general election held in and for Skagit County, Washington, one Fred Blumberg was duly elected county auditor and ex officio clerk of the board of county commissioners in and for said county, and as such auditor was required by law to make and file a good and sufficient bond, the amount whereof was duly fixed in the sum and amount of ten thousand dollars, and accordingly, on the 17th day of December, 1904, the said Fred Blumberg, as principal, and appellant, as surety, executed and filed the said official bond, conditioned as required by law, and the same is set out *in haec verba.* On the 9th day of January, 1905, the bond was regularly approved, and Blumberg, having taken the oath of office, entered upon the discharge of the duties of his office for the term to which he had been re-elected, viz., for the term commencing on the 9th day of January, 1905, and ending on the 14th day of January, 1907.

It is next averred that at the time Blumberg entered upon the performance of his official duties the defendant, Patrick Halloran, was the duly elected, qualified and acting treasurer of said county, and so continued during

said entire term, viz., from the 9th day of January, 1905, to the 14th day of January, 1907, and thereafter until the 1st day of July, 1907; and during said term the defendants, Geo. A. Henson, R. M. Moody and James Dunlap, were the duly elected, qualified and acting members of the board of county commissioners of said county.

It is next averred that under and by virtue of the laws of the State of Washington it was the duty of Fred Blumberg, as county auditor, to issue warrants in payment of bills against the county when the same were approved by the board of county commissioners and he should be by said board lawfully authorized and directed so to do; and it was the duty of defendant, Patrick Halloran, as treasurer, to pay warrants lawfully issued and presented to him therefor by the payees therein named, and at the same time to take up and cancel the various warrants so paid, and preserve and present the same to the board of county commissioners at the next regular quarterly settlement; and it was the duty of said commissioners to give the treasurer credit for said warrants, if found to be valid obligations of the county lawfully paid by the treasurer; and it was the duty of each member of said board of commissioners, at the quarterly sessions held as prescribed by law on the first Monday of January, April, July and October of each year, to check, examine, audit and pass upon the warrants so paid by the treasurer during the preceding quarter, and presented by him to said board, and to allow him credit for all warrants lawfully paid by him in accordance with the orders and directions of the board of commissioners, and it is alleged generally that "said defendant commissioners are expressly charged by law with the duty of auditing the accounts of all county officers having

the care, management, collection or disbursement of county money, and are by law charged with the managemkent of the county funds and business, and * * * are required by law to examine and compare the accounts and statements of the county auditor and county treasurer, and to enter upon their records a statement of the receipts and expenditures of the preceding year, and are further required at their said quarterly sessions * * * to count the funds in the county treasury and ascertain that the same contains the proper amount of funds, and said commissioners are charged by law with the duty of supervising the affairs and business of the county, and have full power and authority to do any and all things, and to employ such assistance to that end as to enable them efficiently and properly to discharge their official duties.'' And it is averred in this connection that under the laws of the State of Washington the treasurer, commissioners and auditor sustained to each other and to Skagit County the relation of joint trustees or fiduciaries, being charged with the performance of certain joint and several duties connected with the proper custody, collection and disbursement of the funds of said county * * * to the end that each of said defendants and said auditor would be a check on and have knowledge and supervision of the official acts of his associates and joint fiduciaries,'' and that a performance by each of said officials of his official duties ''is designed and would in fact be a check on and always disclose any official dereliction * * * upon the part of any and all of said officials, * * * and for the faithful performance by each of said defendants of the duties so imposed upon them by law each executed and delivered an official bond as prescribed by law.''

It is next averred that during his term of office, commencing the 9th day of aJnuary, 1905, and ending the 14th day of January, 1907, and as well during the preceding term to which he had been elected, viz., the term commencing the 12th day of January, 1903, and ending the 9th day of aJnuary, 1905 (the term involved in the Welts case), Fred Blumberg, as county auditor, issued warrants on Skagit County, whereof an itemized list stating the fund on which drawn, date, amount, date paid and payee, is set forth in the bill of complaint, and are in number ninety-two, and those issued during his second term are separately stated from those issued during his first term, and it is averred that said latter warrants were not paid during the term in which they were issued. but were presented to the treasurer and marked presented but not paid for want of money in the fund on which they were drawn, from which time they draw interest at the rate of 6 per cent. per annum, and said warrants, and each of them, were subsequently again presented to defendant, Patrick Halloran, as treasurer, and the same and each of them were paid in full by him. Of the ninety-two warrants set out in the bill it is alleged that three were raised warrants, the payee being Cedardale Lumber Company, and two additional warrants are described in paragraphs X and XI treated by Blumberg in a similar way. (Rec. pp. 11-12.)

It is next averred (Par. XII) that all of the warrants described, except the five raised warrants, were issued by the said Fred Blumberg wholly without authority of the board of county commissioners of Skagit County, or any other authority, and were not in payment of any bills, debts or obligations of Skagit County, but were fraud-

ulently issued by Blumberg for his own use and benefit and to defraud Skagit County; and the raised warrants were wrongfully and fraudulently raised by Blumberg over the sum for which they had been lawfully issued, wholly without authority, and in order to defraud Skagit County. "That having so wrongfully and fraudulently issued said warrants so payable on the face thereof to the parties therein named respectively as payee, without the knowledge or consent of said payees, or any of them, said Fred Blumberg endorsed said warrants, and each of them, with the name of the respective payee, by himself, Fred Blumberg, as county auditor, in substantially the following form, to-wit: 'John Doe (name of payee), by Fred Blumberg, County Auditor', and having so endorsed said warrants * * * said Blumberg presented the same to defendant, Patrick Halloran, county treasurer, and the same were then and there paid to the said Blumberg, except that in some cases, to-wit: in cases where there was no money in the fund on which said warrants were drawn, the said Blumberg, having endorsed said warrants, sold and negotiated the same to innocent third parties, and the same were substantially presented by said parties to defendant, Patrick Halloran, as county treasurer, and the same, and accrued interest, were paid by said defendant treasurer to the holders thereof * * * and said raised warrants were likewise presented to defendant, Patrick Halloran, and the same, including the amount to which they had been unlawfully raised, were likewise paid by said defendant, as county treasurer, out of the funds of said Skagit County."

It is next alleged "that in so paying the aforesaid fraudulent, fictitious and forged warrants said defendant,

Patrick Halloran, acted negligently and carelessly and wholly without inquiry as to the validity of said warrants or the authority of said Blumberg to endorse and collect the same for the said payees named therein, and in willful violation and disregard of his official duties, and in so doing grossly breached the terms of his official bond entered into by him in accordance with the laws and statutes of the State of Washington.''

We may at this place conveniently call attention to the basis of treasurer Halloran's liability, as stated above, viz.:

(1) He was guilty of negligence in paying the fictitious warrants on the endorsement of the auditor without knowledge or inquiry as to his authority.

(2) In disbursing the county's funds on forged warrants issued without authority of law he breached the terms of his official bond.

It is our contention that he thereby became liable to Skagit County on either or both grounds.

The bill then proceeds to show the connection with the subject matter of the suit of the county commissioners (Par. XIV, Rec. p. 14), in substance as follows:

It is averred ''that in accordance with the laws of the State of Washington, and his official duty as county treasurer, defendant, Patrick Halloran, presented to defendants, Geo. A. Henson, R. M. Moody and James Dunalp, as members of the board of county commissioners of Skagit County, the aforesaid warrants so paid by him as aforesaid, together with a list of the same, item-

ized and detailed as prescribed by law, on the first Monday in the months of January, April, July and October of each year, being the dates of the several quarterly sessions of said defendants as county commissioners, and included among said warrants and in said lists all of the warrants so paid by him as aforesaid during the preceding quarter and ending at said time; and in addition thereto complainant further alleges that during the preceding term of office of said Fred Blumberg as county auditor, to-wit: during his term commencing the 12th day of January, 1903, and ending the 9th day of January, 1905, or until his successor should be elected and qualified, the said Fred Blombery had issued, cashed, sold and negotiated a great many fictitious and fraudulent warrants in the manner above described, and at the first session of said defendants, as commissioners of Skagit County, a large number of the said fictitious warrants so issued by Blumberg came before them for audit and approval, as above alleged, and it was then and there the duty of said defendants, as commissioners of Skagit County, to carefully audit, check and examine all of said warrants so coming before them at their several quarterly settlements with defendant treasurer for the purpose of ascertaining that the same were valid obligations of Skagit County, lawfully paid by defendant treasurer, and for which he was entitled to receive credit, but said defendant commissioners, and each of them, wholly failed and omitted to discharge their official duties in that regard for the faithful performance of which they, and each of them, had duly executed an official bond as prescribed by law, and negligently and carelessly, and in total disregard of their official duties, passed said fraudulent warrants without examination of the same.

and allowed credit therefor to defendant treasurer, although any, even the most perfunctory discharge of their official duties would inevitably have resulted in a full disclosure of the aforesaid fraudulent and unlawful proceedings of the said Fred Blumberg, and the fraudulent and fictitious character of said warrants and each of them, at each of said quarterly settlements, and the aforesaid fraudulent and unlawful conduct of said Blumberg would have been fully disclosed at the first session of said commissioners, to-wit: at their session held in the month of January, 1905, at which time many of said fictitious warrants were delivered to them, and the fraud and dishonesty of said Fred Blumberg could and would have been fully disclosed and further peculations prevented, but in consequence of the breach and disregard by defendant commissioners of their aforesaid official duties, and their failure to properly check and audit the accounts of said defendant, Patrick Halloran, and of said auditor, Fred Blumberg, and their failure to count the county funds in the county treasury, and of their negligence and official misconduct and neglect, said Blumberg was enabled to and did continue his peculations, as aforesaid, whereby Skagit County was defrauded out of the sums of money so paid on said fictitious and fraudulent warrants."

It is next averred that at the expiration of his term Fred Blumberg went out of office, and in the month of February, 1907, he died by his own hand intestate and insolvent, and thereupon his defalcations were discovered, and two actions at law were commenced by Skagit County against Allen Blumberg, administratrix, and complainant, as surety on the aforesaid official bonds, and there-

after such proceedings were had in said causes that Skagit County recovered judgment against said administratrix and against complainant, as surety, and said judgments were affirmed in the Supreme Court of the State of Washington on the 10th day of June, 1910, and became final, and the Blumberg estate being insolvent, complainant was forced to and did pay off and discharge said judgments by paying to Skagit County the full amount thereof, interest and costs, which included the sums of money set out in the bill of complaint. (Rec. p. 16.)

It is next averred in substance that by reason of the matters stated in the bill Skagit County had a cause of action against defendants, Patrick Halloran, as treasurer, and Geo. A. Henson, R. M. Moody and James Dunlap, as commissioners, and each of them were equally and jointly liable with Blumberg therefor, and complainant, by reason of its suretyship, having been forced to discharge an obligation for which said defendants were primarily liable as joint *tort feasors,* is equitably subrogated to Skagit County's cause of action against them, and judgment is prayed accordingly. (Rec. p. 17.)

The case against R. O. Welts, Nick Bessner, Geo. A. Henson and W. J. Henry is identical in all of its features save one with the case against Halloran and others, except that it involves fraudulent and forged warrants issued by Blumberg during his first term, to-wit: the term commencing the 12th day of January, 1903, and ending the 9th day of January, 1905. It will therefore be unnecessary to summarize the allegations of the bill of complaint in that case.

The feature peculiar to the Welts case is stated in Paragraph XI of the bil. (Rec. p. 14.) It relates to the embezzlement of Blumberg of the sum of $300.00 paid by one Frank Nixon as a liquor license fee. It is averred that on the 4th day of June, 1903, one Frank Nixon applied to the board of commissioners for a retail liquor license, and paid to Blumberg the fee therefor in the sum of three hundred dollars, but Blumberg fraudulently procured from defendant, Welts, with his knowledge and consent, a receipt issued to Nixon for the year, 1902 and altered said receipt so that the same appeared to be a receipt for the year 1903, and presented the treasurer's receipt so changed, and defendants thereupon granted the application and the license was issued and Blumberg embezzled the fee. Appropriate allegations are made to fix responsibility on the defendants, but as the subject of liquor license fees is involved in the third case where the same will be fully considered, what is there stated may be considered as referring to this item as well.

The third case involves liability of the commissioners, Geo. A. Henson, R. M. Moody and James Dunlap for a number of liquor license fees embezzled by Blumberg. Paragraph IV of the bill avers the election and qualification of Fred Blumberg as county auditor for the term commencing the 9th day of January, 1905 and ending the 14th day of January, 1907. Paragraph V avers that defendants were the duly elected and qualified commissioners during the same term. (R. 4-5.)

The bill of complaint next avers "that under and by virtue of the laws of the State of Washington it was the duty of defendants as county commissioners of Skagit County, and they were empowered by law, particularly

by the act of the legislature of the Territory of Washington of the year 1888, R. & B. Code Sec. 6263, to fix the amount of the license fee for the sale of intoxicating liquors at retail outside the limits of incorporated towns in said county at not less than $300 nor more than $1,000, and to said board is committed by law the exclusive authority to license, regulate or prohibit the sale of intoxicating liquors; and it is further provided by law that before said commissioners should grant any aplication for a liquor license the fee therefor should be paid in advance by the applicant to the county treasurer, and said treasurer is required by law to issue receipts therefor in duplicate, one of which receipts he shall immediately deliver to the person making such payment, and the other he must immediately file in the office of the county auditor. (Rec. p. 5.)

It is next averred that the predecessors of defendants had duly fixed the aforesaid license fee in the sum of $300.00, and subsequently in the year 1906 defendants changed and raised the same to the sum of $500.00, and while said license fee was so fixed in the sum of $300.00 and after it had been raised to the sum of $500.00, the defendants, as county commissioners of Skagit County, granted certain applications for licenses to sell intoxicating liquors in Skagit County outside of any incorporated town therein, a list of the same, with the number of the license, date, licensee and amount of the license being stated, and being sixteen licenses, the fees for which aggregated the sum of $6,200.00 (Rec. p. 6.)

It is next averred "that at the time the applications of the aforesaid parties were presented to defendants sitting as the county commissioners of Skagit County, the

license fee fixed as aforesaid had not been paid to the county treasurer, nor had any receipt been obtained from him, which fact was well known to defendants, and each of them, but in lieu thereof said applicants, either personally or through the auditor, the said Fred Blumberg, presented to defendants cash or their checks payable to the said Fred Blumberg, payee, or checks payable to said applicants by third persons and endorsed by them in blank or to the said Blumberg, wherewith to pay and in payment of the said license fees, and thereupon defendants, as commissioners of Skagit County, in violation and disregard o ftheir official duties, and in violation of the terms of their official oath and bond, negligently, carelessly and unlawfully, granted said applications for liquor licenses, and ordered the license issued and delivered to each applicant respectively; and negligently, carelessly and unlawfully, and in violation of their official oaths and bonds, delivered the aforesaid cash and checks to the said Fred Blumberg, who thereupon converted the same to his own use and has never accounted to Skagit County therefor; and having so unlawfully and carelessly paid over and delivered said funds to the said Fred Blumberg and ordered said licenses issued, said defenants, negligently and carelessly, wholly failed to make any inquiry or investigation for the purpose of ascertaining that said license money was paid to the county treasurer, as required by law, before said licenses were issued; and thereafter the said Blumberg issued and delivered to each applicant aforesaid his respective license for the period of one year, and there by Skagit County * * * suffered a loss of the entire amount of said license money, with the exception, however, of five hundred dollars, being ten per cent'' of five thousand dollars of said license

fees paid by Blumberg to the State of Washington as and for the State's ten per cent. of liquor license fees as prescribed by law. (Rec. 7-8.)

It will have been observed that the paragraph above quoted bases the liability of the defendants upon their failure to discharge their official duties, thereby violating the terms of their respective oaths and bonds; and upon the further ground that they were guilty of negligence with respect to the manner in which they granted the licenses and dealt with the license fees.

The bill of complaint next proceeds to set out at some length the facts concerning the warrants fraudulently issued and cashed by Blumberg in his preceding term, as well as in the same term as alleged in the bills in the Welts and Halloran cases, and which has hereinbefore been stated in detail; and it is averred that many of said fraudulent warrants came before defendants, as commissioners, long before the time that Blumberg converted said liquor licenses fees, and that had defendants discharged their statutory duties they could and would have discovered the dishonesty of Blumberg long before he converted the liquor license fees, and it is further averred that "it is made the duty of said commissioners, in case of discovery of official misconduct or dereliction of duty of any other county officer, to take legal action against him in the name of the county. * * * and in executing the official bond of the said Blumberg, as surety, complainant relied on and had a right to rely on, the protection it would be afforded through the proper performance by defendants of their official duties aforesaid." And it is averred that "as the direct and proximate result of the negligence of defendants,

and their failure to perform the duties of their office, said Blumberg was enabled to and did continue in possession of his office with the opportunity of committing further frauds and embezzlements on Skagit County, and so continued to avail himself of such opportunity * * * all of which would have been prevented had defendants been alert to discover the misconduct of said Blumberg in issuing, and of the treasurer in paying said warrants and proper action taken against *them* (him) as it was the duty of the defendants to do.'' (Rec., p. 9-10-11.)

The bill next avers the discovery of the defalcation and the suits and judgments against complainant and the payment thereof, as hereinbefore stated in connection with the Halloran case, and it is claimed that complainant is subrogated to Skagit County's right of action, as in the other cases, and judgment is prayed accordingly.

To the several bills of complaint the defendants filed joint and several demurrers, specifying two grounds therefor, viz.:

1. That the bills are wholly without equity and state no cause of action.

2. That the cause of action stated was barred by the statutes of limitation of the State of Washington.

The demurrers were argued together and sustained, and complainant declining to plead further, orders of dismissal were entered from which these appeals were duly perfected.

Briefly stated, appellant's theory is that Skagit County had a cause of action against each of the de-

fendants, as well as the cause of action it elected to assert against Fred. Blumberg, the auditor—defendants and the auditor being joint *tort feasors,* jointly and severally liable to Skagit County, and complainant having been compelled to satisfy Skagit County's demand by reason of its suretyship, is equitably subrogated to the County's rights of action against all persons participating in Blumberg's breach of trust and jointly liable with Blumberg to the *cestui que* trust (the County) therefor.

The several propositions of law necessary to be established to support appellant's claims will now be considered in their due order.

First Point.

The defendants, Patrick Halloran and R. C. Welts, treasurers, were liable to Skagit County for the sums paid on the fictitious warrants issued by the auditor, Fred Blumberg.

It is well settled that public officials, especially those charged by law with the management, custody or disbursement of public funds, are fudiciaries or trustees.

Vansant vs. State, 53 Atl. 711 (Md.).
United States vs. Prescott, 3 How. 11 L. Ed. 738.
United States vs. Thomas, 15 Wall. 337.
A. & E. Enc. L. V., 27, pages 219-20.

The treasurers, being trustees or fiduciaries, were bound to exercise a high degree of care and diligence in performing the duties and obligations of their trust, and in protecting the subject matter thereof.

3 Pom. Eq., Sec. 1079.

The author thus states the rule:

"It is well settled that every violation by a trustee of a duty which equity lays upon him, whether willful or fraudulent, or done through *negligence,* or arising through mere *oversight* or *forgetfulness,* is a breach of trust." Citing

Duckett vs. Mechanics Bank, 86 Md. 400.

Continuing the author says:

"The term, therefore, includes every omission or commission which violates in any manner either of the three great obligation already described; of carrying out the trust according to its terms; of care and diligence in protecting * * * the trust; and of using perfect good faith. This broad conception of breach of trust, and the liabilities thereby created, is not confined to trustees regularly and legally appointed; they extend to all persons who are acting as trustees, or who intermeddle with trust property."

Now, then, the bills of complaint allege in terms, and the facts stated in respect to the manner in which the treasurers paid Blumberg's fictitious warrants, solely upon his endorsement of the names of the payees, without inquiry or investigation as to his authority, show, *as a matter of law,* that they were guilty of gross negligence in the performance of their official duties, which was the immediate and proximate cause of the loss.

Ramsey County vs. Nelson, 52 N. W. 991 (Minn.).
Ramsey County vs. Elmund, 93 N. W. 1054 (Minn.).

That the treasurers were liable to Skagit County for

the loss thus occasioned is too clear for argument. The cases cited are directly in point.

In the Nelson case a deputy clerk of court issued a large number of false and fraudulent certificates, in which he certified that certain named persons had served as jurors and were entitled to a stated sum, payable to their order, as compensation. On each certificate he procured the written approval of the auditor, directing the county treasurer to pay the same. He then forged the name of each payee on the back of the respective certificates, presented them to the treasurer, and the latter paid to him the amount called for in each certificate without attempting to satisfy himself of the genuineness of the endorsements thereon. In an action by the county against the treasurer he was held liable, the court saying:

"Payments were not made to the persons named as payees, or to their order, in accordance with the terms of the certificates, but were made to Davis (the clerk), the very person who, as deputy clerk, had the opportunity and had fraudulently issued them, solely upon the false and forged endorsements of the names of the payees. Common prudence ought to have suggested to defendant that before making such payment it was incumbent upon him to ascertain and satisfy himself of the geunineness of the signatures which he found endorsed on the back of the instruments purporting to be those of the payees therein named. He failed to do so, and this of itself is sufficient to sustain the charge of negligence in the performance of his official duty. As was said by the learned trial court, had defendant observed the rule of law which governs in commercial transactions of the

same nature, he would have detected the forgeries at the outset, and there could have been no great loss to the county or himself. His disregard of this rule was negligence, undoubtedly, and it was the immediate and proximate cause of the loss to the county for which defendant must be held responsible."

The Elmund case was an action against a treasurer for having paid certain fraudulent redemption warrants issued by the auditor and on which he, the auditor, had forged the endorsements of the payees, presented them to the treasurer and received the money. The treasurer was again held liable to the county, the court saying:

"By Sec. 755, Gen. St. 1894, it was made the duty of the county treasurer to redeem orders or warrants drawn on him by the county auditor * * * but this section does not relieve the treasurer from the duty of knowing whether he pays the money to the right person. He is not relieved by the mere fact that the ordrs purported to be regularly issued and valid. The fact that Bourne may have issued the orders to a real person and then forged the signature in the endorsement can make no difference. These cases are controlled by *Board of County Commissioners vs. Nelson,* 52 N. W. 991, where it was held that the treasurer was negligent in failing to acsertain whether the purported signatures of the payees of certain fraudulent certificates issued by a deputy clerk of court were genuine."

It will be noted that the identical contentions made in behalf of the treasurer in the cases cited are made in the cases at bar, viz.: that the warrants appeared to be genuine and regularly issued; that the treasurer is re-

quired by statute to pay warrants drawn on him by the auditor, and that the county should look alone to the auditor and his surety. But it is held that the statue did not relieve the treasurer from the duty of knowing that he made payment to the right party; that he was not relieved by the fact that the warrants appeared genuine; that he was guilty of negligence as a matter of law for failing to inquire into the genuineness of the signatures of the payees endorsed on the instruments, and that such negligence was the proximate cause of the loss for which he should be held liable.

In *Ramsey County vs. Sullivan,* 102 N. W. 723 (Minn.). the contention here made in favor of the treasurer was made in favor of the auditor. The Sullivan case was an action by the county against the auditor, based upon the facts stated in the Nelson case, *supra,* it being contended by the auditor that in the Nelson case the court held that the proximate cause of the loss was the negligence of the treasurer in paying the warrants, and that consequently the auditor, who had merely approved the fraudulent certificates issued by the deputy clerk, was not liable, as his act was not the proximate cause of the loss. But the court denied the contention, and held that the auditor and treasurer were jointly liable—were joint tort feasors, and the judgment against the auditor was affirmed.

We submit, therefore, that it is perfectly plain that defendants, Welts and Halloran, were guilty of negligence and were liable to the county therefor.

But not only were they guilty of negligence and liable *ex delicto,* but they were liable *ex contractu,* for having

breached the conditions of their respective oaths and bonds.

The bond is conditioned as follows:

* * * "That all moneys received by him for the use of the county shall be paid as the commissioners shall from time to time direct * * and for the faithful discharge of his duties."

R. & B. Code, Sec. 3938.

Sec. 3940 provides that "he shall receive all moneys due to the county and disburse the same on the proper orders issued and attested by the county auditor."

Sec. 3943 provides: "The county treasurer must keep all moneys belonging to this state, or to any county of this state, in his own possession until disbursed according to law."

He is bound by his official oath to the faithful discharge of his duties.

That the bills of complaint show a manifest breach of their official duties by the treasurers cannot for a moment be denied. That they are liable to the county for the consequences thereof is declared by all authority.

Construing these various statutory provisions, the Supreme Court of Washington has held that a county treasurer is liable *absolutely,* and cannot plead that the money was lost without his fault or neglect.

Fairchild vs. Hedges, 14 W. 117.
Kittitas County vs. Travers, 16 W. 528.

The policy of the State of Washington to hold the

treasurer liable absolutely for the loss of public funds is disclosed by Sec. 3943, *supra,* for, while he is permitted to deposit the money in bank and take a bond, it is expressly provided "that nothing done under this section shall alter or affect the liability of any county treasurer or of the sureties on his official bond."

The same measure of responsibility is fixed by the Supreme Court of the United States.

United States vs. Prescott, 3 How. 11 L. Ed. 738.

That was an action on the bond of a custodian of public funds. The defense was theft. The court says:

"The objection to this defense is that it was not within the condition of his bond; and this would seem to be conclusive. * * * The obligation to keep safely the public money is absolute, without any condition, express or implied; and nothing but the payment of it when required can discharge the bond."

In *United States vs. Thomas,* 15 Wall. 357, the broad language of the Prescott case was limited to the facts, and it was held that the act of God or the public enemy. in that case agents of the Confederacy, would relieve.

It is clear, therefore, that defendants are liable *ex contractu* to Skagit County, whether negligent in paying the fraudulent warrants or not.

It having been shown that the treasurers were liable to Skagit County, we come to our next point, viz.:

Second Point.

The defendant, county commissioners, were also liable

to Skagit County for the sums paid out on the fictitious warrants.

This proposition is two-fold. First to be considered is the liability for the fraudulent warrants, and second, the liability on account of the liquor license fees. The statutory provisions relating to the duty of the commissioners, the proper performance of which would have immediately detected the fraud, are as follows:

R. & B. Code, Sections 3876-77, relates to the commissioners' oath and bond. The bond must be conditioned:

"That such commissioner shall well and faithfully discharge the duties of his office, and not approve, audit, or order paid any illegal, unwarranted or unjust claim against the county."

Sec. 3889 prescribes the general powers and duties of the commissioners. Subdiv. 5 of said section provides:
"To allow all accounts legally chargeable against the county, and not otherwise provided for, and to audit the accounts of all officers having the care, management, collection or disbursement of any money belonging to the county or appropriated to its benefit."

Clause 6 provides:

"To have the care of the county property and the management of the county funds and business." * * *

These statutory provisions have been held to constitute the commissioners the general business agents of the county. Their powers and responsibilities seem to

be analgous to the directors of a private corporation. See

Lincoln County vs. Fish, 38 W. 105.
Reed vs. Ghormley, 47 W. 354.

And for the purpose of enabling them efficiently to perform their duty to audit the accounts of county officers having the care, collection or disbursement of the county funds, and of prosecuting the offender in case he be found delinquent, they may employ experts to audit the books and accounts of such officers, as expressly held by the California Supreme Court construing a similar statute.

Harris vs. Gibbins, 46 Bac. 292.

That the defendants were fully cognizant of their powers in this respect is demonstrated by the fact that they afterwards did this very thing, as alleged in the bills of complaint.

Sec. 3903 provides:

"At the July session the board of county commissioners shall examine and compare the accounts and statements of the county auditor and county treasurer, aside from the regular settlements with such treasurer, and shall enter upon their records a summarized statement of the receipts and expenditures of the preceding year. At the January, April, July and October sessions the board of county commissioners, together with the county auditor, shall count the funds in the county treasury, and ascertain whether it contains the proper amount of funds."

Sec. 3951 provides that the treasurer must at the July session make a verified statement to the commissioners, showing his collections during the preceding year, the warrants certified to him by the auditor, the amount of warrants paid and the amount unpaid, etc.

Sec. 3954 provides:

"Each county treasurer shall attend with his books and vouchers before the board of county commissioners at the regular quarterly settlements of said board in January, April, July and October of each year, and settle his accounts before said board."

At such settlement he shall receive certain specified credits, as follows:

"(1) The amount of principal and interest paid on redemption of warrants. * * * (2) The amount paid the state treasurer. * * * (3) The amount paid on account of redemption orders issued by school districts. (4) All claims for credits not above specified. * * * He shall at such settlement also present, together with such vouchers and claims for credit, a certified list of such vouchers and claims arranged numerically under the separate heading of the funds fro mwhich such vouchers have been paid or on which such claims have accrued, or are made, which lists must be checked, compared and made to correspond with the treasurer's books and vouchers by the board of county commissioners and the auditor at the time of such settlement." * * *

Sec. 3930 provides:

"The board of county commissioners and county

auditor must, at the January, April, July and October settlements with the county treasurer, count the money in the county treasury and make and verify in duplicate statements showing:

"1. The amount of money that ought to be in the treasury.

"2. The amound and kind of money actually therein."

The bill alleges a total disregard by the commissioners of their statutory duties. It also alleges what must be apparent at a glance, that had the commissioners performed their duty the frauds of Blumberg would have immediately been discovered. For example, had the commissioners even looked at the warrants returned by the treasurer with his certified list, as prescribed by Sec. 3954, they would have discovered many fraudulent warrants at their very first meeting after taking office. They must have known upon inspection that no such warrants had ever been authorized by them, and had any doubts existed they had only to turn to the official minutes of the sessions at which the warrants purported to have been authorized, kept as prescribed by Sections 9200 and 3863, R. & B. Code, when all doubt would have been removed. The commissioners are charged with the duty of approving all claims and bills against the county (Sec. 3889), and a mere inspection of the warrants would have disclosed that they had not authorized their issue or approved any claims or bills for which they purported to be in payment, and would have shown the further fact that the warrants were fraudulent because no bill could have been produced to correspond with the war-

rants. Again, had they counted the funds, as required by law, they must have discovered the shortage, because this duty could only be performed by ascertaining what had been paid out on lawful warrants. But aside from the detailed specification of their duties, the requirement that they must audit the accounts of all county officers having the care, custody or disbursement of county funds (Sec. 3889, Subdiv. 5) is sufficient to impose the requirements which, had they been discharged, would have resulted in a full disclosure.

Authorities have already been cited to show that an official is resonsible to the municipality for the consequences of his negligence, and that he is in any event always liable in accordance with the terms of his official bond. Before considering their liability further, we will state the statutory provisions relating to the liquor licenses and discuss both features together.

R. & B. Code, Sec. 6263, is as follows:

"The board of county commissioners of each county in the State of Washington shall have the sole and exclusive authority and power to regulate, restrain, license or prohibit the sale or disposal of spirituous, fermented, malt or other intoxicating liquors outside the corporate limits of each incorporated city, incorporated town or incorporated village in their respective counties; Provided, that the annual license fee for the sale of spirituous, fermented, malt or other intoxicating liquors shall, in no instance, be less than three hundred dollars, or more than one thousand dollars, which said license fee shall be paid annually in advance to the county treasurer, who shall pay ten per cent. of the amount into the gen-

eral fund of the state treasury, thirty-five per cent. into the county school fund, and the remaining fifty per cent. into the general fund; Provided further, that no license shall be granted to sell spirituous, fermented, malt or other intoxicating liquors by said county commissioners within one mile of the corporate limits of any incorporated city, town or village." (Laws 1888, p. 124.)

It will be noted that the statute requires the license fee to be paid "in advance to the county treasurer." The inquiry that is thus suggested is, in advance of what? This inquiry is answered by reference to the subject matter of the section. Since the section deals with the matter of authorizing the sale of liquors, the words "in advance" must mean that the fee shall be paid to the treasurer before the license or authority is granted.

Having in mind the provision of the statute, the bill of complaint in the Henson case charges as the first breach of duty by defendants that at the time the applications for liquor licenses were presented to the commissioners the license fee had not been paid to the treasurer, which fact was known to the defendants, but notwithstanding, they negligently and carelessly, and in violation of their official duties, granted the applications and ordered the licenses issued. It thus plainly appears that defendants were guilty, either wilfully or negligently, of a breach of their official duties and of the terms of their bonds, which, if the proximate cause of the loss of the license money, gives rise to a cause of action in favor of the county against each of them.

That defendants were joint tort feasors with Blum-

berg, and jointly liable for the loss of the funds, is settled by many text writers and adjudged cases, but a discussion of this feature will be postponed to our next point, when the liability of the defendants in the other cases may be considered at the same time.

Other statutes disregarded are the following:

R. & B. Code, Sec. 3940.
Pierce's Code, Sec. 405.

The first section cited provides that the treasurer "shall receive all moneys due and accruing to the county"; and "shall issue his receipt in duplicate therefor, one of which receipts he shall immediately deliver to the person making such payment, and the duplicate of such receipt must be immediately filed by such treasurer in the office of the county auditor."

The second section cited provides that no county official shall discharge any of the duties or act as the deputy of any other officer.

The bill of complaint shows that these provisions were disregarded, for in undertaking to receive the license fees the commissioners were usurping one of the functions of the county treasurer. Under R. & B. Code, Sec. 3940, read in connection with Sec. 6263, the only lawful course in granting applications for liquor licenses would be for the applicant to pay his fee to the treasurer, take his receipt and present the receipt with his application for a license to the commissioners, and then, and then only, would that body be authorized to act. Until the applicant exhibited his receipt the commissioners were utterly without authority to pass upon an application.

This is the only permissible construction of the sections applicable, and in practice was observed, except as to the fees involved in this suit.

But if it be contended that defendants were authorized to grant an application under the circumstances stated, then we come to consider two other grounds of liability pleaded against them.

The points now to be discussed are applicable also to the liability of the commissioners on account of the warrants, as well as for the license fees, as it relates to the consequences of the total abdication of their functions disclosed in the several bills of complaint.

Paragraphs numbered IX., X. and XI. of the bill in the license fee case states the facts concerning the fraudulent warrants issued by Blumberg, as alleged in the Welts and Halloran cases, and the duties of defendants in connection therewith, and in addition it is averred that an inspection of the treasurer's statements would have shown that he had not received the license fees on the applications therefore granted, and it is averred that in consequence of the negligent failure of the commissioners to perform their statutory duty Blumberg was enabled and did continue to defraud Skagit County. The ultimate fact averred being that had the commissioners performed their statutory duties they could and would have discovered the auditor's defalcations at the outset. and in case they had done so it was their duty to take steps to prosecute him and thus prevent further defalcations in the future. With reference to the license fees. it is further alleged that "having so unlawfully and carelessly paid the same to Blumberg and ordered said

licenses issued, defendants negligently" failed to make inquiry to ascertain that he properly disposed of the money.

The statutory duties of the commissioners in connection with the warrants and accounts of the auditor and treasurer have already been considered, and in connection therewith, and as showing the interpretation which should be put thereon, it is in point to consider the general duties incumbent upon fiduciaries, especially those charged with the administration of an important public trust.

That the relation of public officers, such as commissioners, treasurer and auditor, is a trust relation is recognized in every definition of "Public Office."

> 29 Cyc., p. 1361 *et seq.*
> *Whitbeck vs. Ramsey,* 74 Ill. App. 524.
> *Andrews vs. Pratt,* 44 Cal. 317.

That they are joint trustees or fiduciaries—jointly and severally liable to the *cestui que* trust—is equally well settled. And where there exists a joint trusteeship they may become liable to the *cestui que* trust for the misapplication by their co-trustee of the trust estate, though not actively participating therein or deriving any personal advantage therefrom. Thus Mr. Pomeroy states the principle under consideration:

"With respect to the liability of a trustee for the acts of a co-trustee, there are three modes in which he may become liable according to the ordinary rules of the court: (1) Where one trustee receives trust money and HANDS IT OVER to a co-trustee without securing

its due application; (3) Where he permits a co-trustee to receive trust money without making due inquiry as to his dealings with it. * * * It thus appears that the consent to a co-trustee's breach of trust need not be express. It may be implied from the trustee's conduct in refraining from taking reasonable and necessary steps to prevent or repair the loss."

Pom. Eq. Jur, 3rd Ed., Sec. 1082.

"As a trustee cannot delegate his authority to a subordinate, so on the same principle he cannot idly yield or surrender the entire control of the trust property and exercise of the trust functions to his co-trustees when he is associated in the trust with others. A trustee is not liable under all circumstances for every act or default of his co-trustees; but still, in general, where there are several trustees the beneficiary is entitled to that security and protection which results from the care, oversight and co-operation of all the trustees. If, therefore, a trustee virtually abandons his active functions, neglects to interpose in the management, and leaves the whole control to his co-trustees, he will be liable for losses occasioned by their wrongful acts or neglects."

It was the express purpose and design of the statutes relating to the duties of the auditor, treasurer and commissioners that the county should have the "security and protection which results from the care, oversight and co-operation" of all these officials, and it is consequently too clear for argument that the neglect by them of their statutory duties, prescribed by law for the security of the trust estate, whereby one of their number is enabled to deplete the same, will render the former equally liable to the *cestui que* trust with the latter.

And that much less than active participation is sufficient to make a trustee liable for the *devastavit* of a co-trustee has heretofore been pointed out.

3 Pom. Eq., Sec. 1079.

"It is well settled that every violation by a trustee of a duty which equity lays upon him, whether willful or fraudulent, or done through *negligence,* or arising through mere *oversight or forgetfulness,* is a breach of trust."

Illustrations of this principle which are here directly in point are afforded by the three Ramsey County cases, above cited.

Ramsey County vs. Nelson, 52 N. W. 991.
Ramsey County vs. Elmund, 93 N. W. 1054.
Ramsey County vs. Sullivan, 102 N. W. 723.

It is held in these cases that the deputy clerk who fabricated the orders, the auditor who negligently approved them and the treasurer who negligently cashed them, were guilty of concurrent negligence—were joint tort feasors and were jointly and severally liable, each *in solido.*

We submit, therefore, that these commissioners were liable to Skagit County for the proximate results of their negligence and failure to perform their official duties.

A still further ground of liability of the defendant commissioners for the warrants as well as the license fees is predicated upon that feature of the bills of complaint averring in substance that the performance of

their statutory duties would have led to a full disclosure of the frauds of Blumberg at the outset, and if discovered it was their duty to protect the trust estate by action in court if necessary.

It seems to us that there is no answer to this contention. It is self-evident, as said by the court in the Nelson case, that had defendants exercised ordinary care in the discharge of their duties "they would have detected the forgeries at the outset, and there could have been no great loss to the county or themselves." Blumberg's misconduct must inevitably have been fully disclosed at the very first meeting of the commissioners after they took office. But the commissioners say they were innocent of participation in the wrong of Blumberg, and had no knowledge thereof. But this plea is unavailing. The reply is that they had the means of knowledge and it was their duty to know. This is equivalent to actual knowledge, and their conduct must be judged accordingly.

Shelby County vs. Bragg, 36 S. W. 600.
Ward vs. Marion County, 62 S. W. 557.
Commissioners vs. Lodz, 36 N. E. 772.
State vs. Railway, 112 N. W. 515.
Leather Mfrs. Nat. Bank vs. Morgan, 117 U. S. 96, 6 S. C. R. 657.

These cases are cited as illustrations of a rule that will not be questioned. That the means of knowledge, coupled with the duty to know, is equivalent in law to actual knowledge, is the doctrine of all authority.

In the Bragg case the county sought to postpone the running of the statute of limitations on the ground of

concealment by a defaulting clerk of his defalcations. But the court says:

"The county court (commissioners) is given the power to audit the accounts of these officers, and it is made their duty to examine statements made by them, and, if necessary, to hear the evidence of witnesses. A mere examination of the statements is not a proper performance of their duty. They should see that the statements are correct. * * * It cannot be said that the county court was ignorant of facts which were open to its examination, and which it was its duty to know." * * *

The Lodz case was an action against a treasurer to surcharge his accounts. The defense was limitation, to which reply was made that the cause of action had been concealed so as to postpone the running of the statute. The Indiana statute prescribing the duties of the commissioners, as quoted in the opinion, seem to be substantially identical with the Washington statutes. The court says:

"The board of commissioners, for all financial and ministerial purposes, is the county. It has the care of the property of the county, as well as its supervision and management. It has the power to audit the accounts of all officers having the care, management and disbursement of money belonging to the county, and it has the power to contract with an expert for the examination of the accounts of the county treasurer. We do not think that the facts stated show a concealment, but, if it were conceded that the manner in which the books were kept might have mislead the board at the time of the settle-

ments, still the record of the accounts—the facts and figures—were in existence and at the disposal of the board at any time; and it was its duty to carefully audit the same, and it might have employed an expert for that purpose if it deemed it necessary. Every avenue of information and every opportunity for investigation was open to the board during all the time the appellee was in office, and all the time afterward until the commencement of this action."

The same principle has been applied by the Supreme Court to ordinary commercial transactions.

The Morgan case, *supra,* was an action by a depositor against a bank to surcharge an account with the amount of certain forged checks issued by a cleark of the depositor and paid by the bank and charged to the depositor's account. It appeared that the bank had returned several of the forged checks to the depositor at the time of periodical settlements, but the depositor had omitted to make an examination of the returned checks. and thereby the clerk was enabled to and did continue his forgeries. It was held that the depositor could not recover for any checks forged by his clerk after he could and should have discovered his peculations at the time the first forged checks were returned by the bank. The principles applied in this case are:

1. The depositor owed to the bank the duty of examining the accounts and returned checks.

2. That he was chargeable with such knowledge as he would have acquired by the performance of this duty.

In other words, that the duty to know, coupled with

the meansof knowledge, was equivalent to actual knowledge, and his rights are fixed on that basis. The court says:

"But if the evidence showed that the depositor intentionally remained silent after discovering the forgeries in question, would the law conclusively presume that he had acquiesced in the account as rendered* * * * and yet forbid the application of the same principle where the depositor *was guilty of neglect of duty in failing to do that which he admits would have readily disclosed the same fraud?* It seems to the court that the simple statement of this proposition suggests a negative answer to it."

Apply this principle to the defendants' conduct, as averred in the bills of complaint. The duty to know, which, in the Morgan case arose from the nature of the relation of a depositor to his bank, in the cases at bar arises from express statute and the nature of the relations between defendants and the county. The means of knowledge, which, in the Morgan case, were afforded by the returned checks, in the case at bar were even more fully afforded by the cancelled warrants, treasurers' statement of accounts, auditor's stub book, commissioners' minutes, and the many other books and papers required by law to be kept, and all of which were accessible to defendants. And in addition, defendants were empowered to employ accountants to examine the same.

Now then, judge defendants' conduct in the light of actual knwoledge of the facts which it was their duty to know and which they could have known. Can it be supposed that they were not guilty of gross misconduct

in permitting Blumberg to continue in the discharge of his duties, knowing the frauds he had been committing on the county for many years prior to the time he embezzled the first license fee? The same observation also applies to the warrants. Bulmberg was permitted to issue scores of warrants after the time his dishonesty could and should have been discovered in January, 1904. What must be said of the conduct of a fiduciary of a sacred public trust who knowingly permits a co-trustee (or a stranger to the trust, if you prefer so to regard Blumberg) to embezzle the trust funds extending over a series of years and makes no protest? And not only do they continue him in office, but they go out of their way and unnecessarily afford him the opportunity of embezzling further funds by committing to him the duty of paying the license fees to the treasurer, and that, too, without making inquiry to see that he correctly applied it.

Independent of statute such conduct is indefensible. Mr. Pomeroy says with reference to the liability of a trustee:

"Where he becomes aware of a breach of trust, either committed or meditated, and abstains from taking the necessary means to obtain restitution."

3 Pom. Eq., Sec. 1082.

And again:

"The duty of protecting the Trust Property:

"The trustee is bound to protect the trust property in every reasonable manner during the continuance of the trust."

R. & B. Code, Sec. 3890, relates to the general powers and duties of the commissioners. Clause 6 provides:

"To have the care of the county property and the management of the county funds and business, and in the name of the county prosecute and defend all actions for and against the county." * * *

We submit that it is too clear for argument that Skagit County had a cause of action against the commissioners under the facts averred in the bills of complaint.

It having been established that the county had a cause of action against the treasurer and commissioners, we come to consider the nature of their liability.

Third Point.

The treasurer, auditor and commissioners, being joint trustees or fiduciaries, are, by reason of their misconduct, joint tort feasors, and are jointly and severally liable.

This point has already been considered, and authorities have been cited to establish the same, particularly the Ramsey County cases, *supra*. It is separately stated at this place merely for the sake of emphasis.

It having been established that the county had a cause of action against the treasurer and commissioners, and that they were jointly and severally liable, we come to our next point, viz.:

Fourth Point.

Complainant is equitably subrogated to Skagit County's cause of action against defendants.

Pure subrogation, as distinguished from equitable assignments, has been often aptly described as the mode whereby equity compels the ultimate discharge of an obligation by him who ought to pay it. It is broad enough to include every instance in which one who, not being a mere volunteer, pays a debt which, in justice, equity and good conscience, ought to be paid by another.

Davis vs. Schemmer, 50 N. E. 373 (Ind.).
Boston etc. Co. vs. Thomas, 53 Pac. 472 (Kan.).
Nalle vs. Farrish, 34 S. E. 985 (Va.).

The cases at bar are typical of those in which the rule stated has been applied. Complainant, an innocent party, has, by reason of its suretyship for one of several joint tort feasors, been forced to suffer a loss caused by a tort committed by defendants. Is it in accordance with equitable principles that complainant should bear the loss, or that those who have brought the loss about should bear the same? Who is, in equity, the party that should ultimately bear the loss? It needs no argument or citation of authorities to prove that defendants should bear the loss. Equity always requires a loss to be borne by the party who has occasioned it rather than by an innocent party. This rule has even been extended so as to apply between parties equally innocent, it having long been a settled principle of equity jurisprudence that where one of two innocent parties must bear a loss, he by whose act the loss was caused, *however innocently,* should be the one to bear it. This is familiar law and needs no citation of authority. With how much greater force do these principles apply in these cases. Here we have on the one hand county treasurers paying warrants drawn to third parties on the endorsement of the auditor, the

party issuing them, wholly without inquiry as to his authority to endorse and collect or negotiate the same. We have the commissioners passing the warrants and wholly omitting the performance of their sworn statutory duty over a period of years. On the other hand, we have complainant, a wholly innocent party, who must be presumed to have executed the auditor's bond for a nominal consideration in reliance on the other officials discharging the duty they had taken an oath to faithfully perform, and which, if performed, would directly inure to its benefit. Surely equity will prefer complainant. This view is sustained by all authorities.

A. & E. Enc. L. V., p. 219, 220.

"The sureties of a fiduciary who are compelled to satisfy a liability occasioned by his default, devastavit or breach of trust, will be subrogated to all the rights and remedies of the *cestuis que* trust, creditors or other beneficiaries, against the fiduciary *and those participating in the default, devastavit or breach of trust.* This rule is applicable to all persons occupying a fiduciary relation."

"In accordance with the general principles already stated (above), sureties on the bonds of state or county treasurers, who are held liable for the defaults of their principals, are subrogated to the rights of the state or county against such principals, *and against all persons participating in their malfeasance.*"

The surety is not only subrogated to the obligee's rights against the actual embezzler, but as well to his rights against those who participated in the "breach of

trust." This statement of the rule definitely includes the defendants, for, as heretofore pointed out, much less than active, conscious participation is sufficient to constitute a breach of trust.

3 Pom. Ey., Sec. 1079.

"Every violation by a trustee of a duty which equity lays upon him, whether willful or fraudulent, or done through *negligence,* or arising through mere *oversight or forgetfulness,* is a breach of trust."

In the Ramsey County cases this principle was applied to a situation identical with the one shown by the bills of complaint in the instant cases. There was no active participation by the auditor and treasurer, who were held jointly liable with the deputy clerk. They were merely negligent, yet were held to have participated in the fraud of the deputy clerk so as to be joint tort feasors with him and jointly liable.

American Bonding Company vs. Mechanics Bank, 55 Atl. 395 (Md.).

A city clerk of Baltimore deposited money in the bank, which paid him interest on the deposits. The clerk was sued by the city to recover the amounts paid by the bank on the city money, and the surety had to pay the claim. The surety then brought the above action against the bank, claiming subrogation to the city's cause of action against the bank. It was held that the bank was jointly liable to the city with the clerk, and the surety having paid the loss, was subrogated to the city's right of action against the bank, the court saying:

"That the doctrine of subrogation does go to the extent of giving to the surety, who has paid the debt of his principal, the benefit of the rights and remedies of the creditor *against all persons who were liable for the debt,* is both asserted by the text writers and sustained by the authority of many decided cases. (Citing authorities.) This is especially held to be true of the sureties of a fiduciary who are compelled to answer for his breach of trust, and they have been repeatedly subrogated to the rights and remedies of both the trustee and the *cestui que* trust against the fiduciary and *those participating in the wrongful act.*"

In the case cited the bank paid the interest in good faith in pursuance of a long established and well understood custom. Our cases are even stronger in favor of the right of subrogation, for not only did defendants participate in the diversion of the funds through their negligence, but under the terms of their bond they were also liable *ex contractu* independent of the question of their negligence, under the Prescott and Thomas cases, *supra,* and it has been held times without number that a surety is subrogated to all of the creditor's securities, mortgages and other *ex contractu* rights.

Prairie Bank vs. United States, 164 U. S. 227.

In that case the United States withheld a per cent. of the contract price of a public building. The contractor defaulted and the sureties completed the contract. It was held that the contractor's sureties were subrogated to the rights of the United States to look to the reserved fund, and consequently were entitled to the fund in preference to assignees of the contractor whose rights accrued subsequent to the execution of the contract, but

prior to a loss, although the consideration for the assignment was the advancement of funds by the assignee which were used in the work.

The following cases are also in point:

Bank vs. Rhodes, 63 S. W. 68.
Bank vs. F. & D. Co., 56 S. W. 671.
Mendel vs. Boyd, 91 N. W. 860.
Arnold vs. Green, 115 N. Y. 672.
Bank vs. Bynum, 56 S. W. 532.

Many other cases could be cited, but the foregoing are sufficient, as the principle contended for is elementary. It seems to us that the cases at bar are typical examples of those cases wherein the courts have uniformly allowed subrogation.

The propositions of law necessary to complainant's substantive rights having been established, we come to our next and last point, which relates to the period of time in which the rights must have been asserted.

Fifth Point.

Limitation only commenced to run from the time that complainants discharged the obligations with respect to which it seeks indemnity against the defendants in these actions.

It appears that more than three years elapsed from the time when Skagit County discovered the Blumberg defalcations to the date when these bills of complaint were filed in the court below. Defendants therefore take the position that at the time of the commencement of thse actions the county's right to sue was barred by

the three years' statute of the State of Washington, which it is contended is the applicable period, and that therefore these actions are likewise barred.

It is true that the state courts have held that an action on an official bond is barred by limitation of three years, but this holding of the state courts is one of general law merely, and not the construction of a state statute by which the United States courts are bound. We therefore say that this court is at liberty to decide the point in accordance with what is believed to be the correct rule. The correct period of limitation to be applied is six years, as in cases of actions on written contracts.

R. & B. Code, Sec. 157, Subdiv. 2:

"Within Six Years.

"2. An action upon a contract in writing, or liability express or implied arising out of a written instrument."

It seems to us that the right of Skagit County to sustain an action against the defendants on their official bonds for a breach of their official duties secured by their respective bonds is an action on a written contract, or at least it is a right of action arising out of a written agreement. It is true that the county would have a right of action regardless of the written contract of indemnity, but it also had a right of action based on the written contract. The legal situation here is analogous to an action for goods sold and delivered, or for labor performed. The seller would have a right of action to recover the price in the absence of a contract

written or verbal therefor, but if brought for a *quantum valebat* it would be governed by the three years' statute, although in case the contract was reduced to writing no one would contend that the six years' statute was not applicable. It seems to us that the decision of the supreme court in the cases cited by appellees is unsound and should not be followed.

However, we submit it is immaterial what statutory period is applicable. It is undisputed that the actions were commenced within a few months after complainant paid off and discharged the judgments obtained by Skagit County, and limitation did not commence to run until that time.

The first principle of the law of limitation, and the one most universally applied, is that limitation will not run until a right of action has accrued. Limitation never runs against one incapable of maintaining an action to obtain redress.

25 Cyc., pp. 1066-67.

It will not be questioned that appellant could not have maintained these bills until it was in a position to allege and prove payment of the loss for which it is suing to recover indemnity. Had the bills been filed at any time prior to payment of the Skagit County judgments they would have been fatally defective. Demurrers must have been sustained. No cause of action existed in favor of appellant until the judgments were paid, for only then had damage been sustained.

This rule has uniformly been applied to contracts of guaranty and indemnity, it having been always held that

limitation against a guarantor only commences to run from date of payment.

25 Cyc. 1092-93.

The same is true of endorsers and sureties on commercial paper.

25 Cyc. 1113.

And of the right of a co-surety to recover where he has paid more than his proportion of the debt.

25 Cyc. 1115.

The cases in which it has been held that the right of a subrogee to maintain an action to recover indemnity is not barred until the statutory period has elapsed, commencing with date of payment, are numerous and controlling.

Burrus vs. Cook, 93 S. W. 888 (Mo. App.).
Burrus vs. Cook, 114 S. W. 1065 (Mo. Sup.).

Burrus vs. Cook was a suit in equity to enforce the right of subrogation. A demurrer to the complaint was sustained upon the ground that the action was barred by limitation. The facts are as follows:

One Bowlin was the creditor of Weese, and plaintiff, Burrus, and defendant, Cook, were sureties for the debtor, Weese. On September 20th, 1886, Bowlin recovered judgment against the principal and sureties, and the principal and surety, Weese, being insolvent, Burrus was forced to pay the judgment, and did so June 25th, 1888. Subsequently plaintiff, claiming to be the equitable owner of the judgment by virtue of the principle of subrogation, brought this action seeking to recover one-half thereof from his co-surety, the defen-

dant, Cook. The questions for decision were: 1st, whether plaintiff was subrogated to the judgment; 2nd, whether the action was barred by limitation. With respect to the second proposition the court was required to determine whether plaintiff was entitled to such time in which to enforce the judgment as was allowed by law to the original owner, or whether he was only entitled to the period allowed by law to recover contribution from his co-surety, dating from date of payment.

The court held that plaintiff was subrogated to all the rights of the creditor in the judgment, and the majority held that he was entitled to maintain an action on the judgment at any time within twenty years. In other words, that the subrogee was allowed such time in which to enforce his cause of action as was allowed by law to the original creditor to whose rights he was subrogated. The case is, therefore, favorable to appellee's contention, and was accordingly cited and relied on by them in the lower court. But there is a dissenting opinion written by Judge Ellison in which the contrary view is maintained with great force and a multitude of authorities cited. The dissenting opinion (which was sustained by the Supreme Court) maintains that, while it is true plaintiff was equitably subrogated to all the rights of the creditor whose debt was discharged, including the judgment, that he must assert those rights within the time allowed by law for the assertion of his own right of contribution, viz.: five years, and was not entitled to the period of twenty years allowed for commencement of actions on a judgment. In other words, that the subrogee's cause of action is governed by its own period of limitation, dating from date of payment

by him, and is in no way affected by the limitation applicable to the claim of the principal creditor to whose rights and remedies he is subrogated. The following quotations from the opinion are directly applicable to the instant cases:

"That a surety, upon payment of the debt, has a right to the instrument upon which he is surety, with all the rights, secureties and liens which attach to it, but he must assert those rights within five years after such payment. Where a surety who has paid the debt does not act until his claim is barred at law by the statute of limitations, manifesting his intention to put himself in the place of the original creditor, and thereby subrogating himself to the creditor's rights, equity will not subrogate him to those rights. Brandt, Suretyship, 3rd Ed., Sec. 339. Before a right to subrogation accrues to a surety, he must have paid the debt (in case of a co-surety more than his portion of the debt), and it must have been a valid debt at the time of his payment. Furthermore, as stated by Judge Story, other issues of a very complicated nature may arise from counter equities between some or all of the parties. * * * These various issues of fact may be the subject of sharp dispute, and their solution will greatly depend upon oral testimony and the life and memory of witnesses. *He should be required to establish his right within the period of its own limitation, and not the period of limitation of the original indebtedness, or of a judgment rendered thereon, for these periods might cover a great length of time;* in this case, it is said, the space of twenty years." * * *

"In undertaking to defend the position that subro-

gation of a surety operates to place him literally in the creditor's shoes, with all the rights of the creditor, and to make him literally the owner of the creditor's claim, as though he were an ordinary assignee, and therefore entitled to the periods of limitation prescribed for a note, one is led into the most unreasonable, illogical and inconsistent positions. Thus a creditor has the right, of course, to recover the full amount of the note, but the surety is not permitted to speculate off his principal nor his co-surety, and can recover no more than he has been compelled to pay for him. * * * So, the indebtedness for which he is surety may draw the highest rate of interest permitted by law, and yet the surety will only recover the legal rate on the sum he pays from the time of payment. * * * The fact is the surety, in some instances, has longer time than the creditor, and in some shorter. Thus, if he should pay a part of a note upon which he was surety the day before it was barred by the statute, he would yet have five years in which to bring his action, for his cause of action can only arise when he makes payment, though the creditor would be barred in one day for the balance. On the other hand, he might make such part payment the day it became due, and the creditor would have ten years in which to sue for the balance, while the surety would only have five in which to bring the action. *These, of course, are only illustrations, but they serve to show that the rights of the creditor and the rights of the surety have distinct periods of limitation.*" * * *

Much more to the same effect might be quoted, but the foregoing is sufficient to show the reasoning of the court, and it seems to our minds conclusive. Judge Ellison states that in the extended examination he had

made he could find but two cases holding to the contrary. One of them was later overruled by the same court, and the other, besides being based on the overruled case, was mere *obiter*.

By reason of the divergence of opinion in the lower court, this case went to the Supreme Court of Missouri, where the dissenting opinion was adopted verbatim.

Burrus vs. Cook, 114 S. W. 1065.

At the time of the argument in the lower court the later opinion of the Supreme Court was not known to counsel for either party. In as much as counsel for appellees cited and relied on the majority opinion as directly in point in their favor, we feel strengthened in our opinion that the diametrically opposite dissenting opinion and the reasoning on which it is based is directly in point in our favor, and as it was affirmed by the Supreme Court, and is, besides, in accordance with reason and precedent, it should be followed by this court.

The question of the period of limitation applicable to the subrogee's right of action has been considered in many cases.

Koscher vs. Koscher, 39 Atl. 535 (N. J. Eq.).

Held that a life tenant who paid off a mortgage on the estate is subrogated to the rights of the mortgagee, and an action brought within the period of limitation applicable to the enforcement of his right, dating from date of payment, is in time.

Pollock vs. Wright, 87 N. W. 584 (N. D.).

The following language is used:

"If appellants ever possessed the right of subrogation, clearly the statute began to run against such right when the payment upon which they rely was made." * * *

Haberman vs. Heidrich, 66 S. W. 106 (Tex.).

A statute of Texas provides that limitation shall be suspended when the debtor is residing out of the state. Plaintiff was surety on a note. After maturity defendants moved out of the state. The payee sued plaintiff, the surety, and recovered judgment, which was paid. At time of payment defendant had removed from the state. Plaintiff, the surety, then sued the maker, defendant, and limitation was pleaded. It was held that the statute suspending limitation did not apply, since plaintiff, the subrogee, did not have a cause of action until he paid the note, at which time defendant was a nonresident, and the action was barred.

Darrow vs. Summerfield, 53 S. W. 680 (Tex.).

An injunction bond with sureties was given in an action to restrain the enforcement of a vendor's lien on land. The injunction was dissolved and a grantee of the surety on the bond paid the judgment, thus satisfying the lien, and claimed subrogation to the lien thus satisfied. Held, that she was subrogated, but that the right to enforce the lien arose out of a natural equity, and not by virtue of the contract in which the lien was retained, and accordingly the cause of action to enforce the same was barred in two years, dating from date of payment by the surety, notwithstanding that the statute had not run against the contract lien, and that the same

would have been enforcible if still owned by the original owner.

Power vs. Munger, 52 Fed. 705 (CCA 8th C).

Defendants made a contract to haul the steamer Butte out of a river onto ways operated by them. They also made a similar contract with the owners of the steamer McLeod. By reason of defendant's negligence the Butte slipped off the ways into the river and collided with the McLeod, which sunk. The owners of the McLeod libeled the Butte, and the owners of the latter were forced to pay damages in admiralty. Upon payment of such damages the owners of the Butte brought this action against the defendants to recover the sum which they were forced to pay to the owners of the McLeod in consequence of defendants' negligence. The question for decision is whether limitation commenced to run in favor of defendants at the date of the collision, when the damage was done, or from the date when plaintiffs were compelled to pay the loss.

Defendants contended that in as much as the cause of action in favor of the owners of the McLeod against them was barred, so was plaintiff's cause of action which grew out of the same state of facts; in other words, that plaintiff's cause of action dated from the time when the owners of the McLeod could have maintained the action. It will be noted that this contention is identical with that made here by appellees, viz.: that because the county's cause of action accrued at date of discovery of Blumberg's fraud, and is barred, so is appellant's cause of action. But the court says:

"On the other hand, if the owners of the Butte had

brought an action on the ground of negligence against C. S. Weaver & Co., the facts would not have sustained a right of recovery. Negligence alone does not create a right of action. There must be negligence and consequent damage. When the Butte collided with the McLeod, the sinking of the latter did not cause injury to the property or property rights of the owners of the Butte. No grounds then existed for awarding damages, either substantial or nominal, to the owners of the Butte as against Weaver & Co. for the sinking of the McLeod. Whether the sinking of the McLeod would ever be a cause of damage to the owners of the Butte would depend upon a contingency; that is, upon another event, to-wit: whether they would be called upon to make good the damage caused to the McLeod. If they were not so called upon, then the alleged negligence of Weaver & Co. in causing the destruction of the McLeod would not cause damage to the owners of the Butte; but, if they were compelled to make good the loss caused by the sinking of the McLeod, then, and not till then, could it be said that the negligence of Weaver & Co. in causing the destruction of the McLeod had resulted in damage to the owners of the Butte."

"The right to sue for indemnity for the money which the plaintiff was compelled to pay did not accrue until payment had been made, and, necessarily, the statute of limitations did not begin to run until the right to sue therefor had accrued."

Similarly, in the instant case, the misconduct of Blumberg which gave a right of action to the county, was not an invasion or injury of any of appellant's rights, nor was it a loss or detriment to it in any way. Had Blum-

berg been solvent and able to pay the loss complainant would never have been damaged at all. Whether or not the misconduct of Blumberg would be a loss to complainant depended upon a future contingency, viz.: whether the county would call on complainant to make good the loss, and whether complainant would be compelled to do so. If complainant was not forced to pay the loss it would never have a cause of action. If Blumberg himself paid the loss, complainant was saved harmless, and could maintain no action. Even if complainant, itself, was insolvent, and therefore unable to satisfy the judgment, it could not maintain these bills. It must have actually satisfied the loss. Consequently limitation could not commence to run until that time. *Power vs. Munger* is directly in point. That was an action at law instead of in equity, but the form of the action is immaterial. Besides, equity follows the law with respect to the period of limitation.

Burrus vs. Cook, supra.

We submit, in conclusion, that it would be a great injustice to appellant for the court to hold that all the time appellant was contesting the claim of the county, limitation was running against it and in favor of these deefndants. The litigation between complainant and the county wolud have inured directly to defendants' benefit had it been successful. As a matter of fact it was in large part successful in the lower court, but the decision of the state supreme court was adverse. Suppose, after having been successful in the lower court, appellant had nevertheless discharged the obligation, and then brought these actions. We would have then been confronted by the plea that in so doing we were simply

a volunteer paying an obligation for which we were not liable. The only course open was for appellant to resist the actions of the county and only to pay the loss after final determination by the highest court. Had payment sooner been made we would now have to contend against a plea that the surety was not liable for Blumberg's defalcations, and that, therefore, payment thereof was purely voluntary, instead of the plea of the statute. To adopt defendants' contention on this point would be to place the subrogee at the discretion of the principal creditor. If the creditor delays action against the debtor and surety, or if the litigation is drawn out, the right to subrogation will in many cases be barred before the subrogee has an opportunity to avail himself of his right. Certainly equity does not confer a right with one hand and take it away with the other.

We submit that the judgment in these cases should be reversed with directions to the circuit court to overrule the demurrers.

Respectfully submitted,

F. S. BLATTNER,
L. B. da PONTE,
Solicitors for Appellant, American Bonding Company.

Address: Tacoma, Washington.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AMERICAN BONDING COMPANY, of Baltimore, Maryland, *Appellant,*

vs.

R. O. WELTS, NICK BESSNER, GEO. A. HENSON and W. J. HENRY, *Appellees,*

1989

AMERICAN BONDING COMPANY, of Baltimore, Maryland, *Appellant,*

vs.

PATRICK HALLORAN, GEO. A. HENSON, R. M. MOODY and JAMES DUNLAP, *Appellees,*

No. 1990

AMERICAN BONDING COMPANY, of Baltimore, Maryland, *Appellant,*

vs.

GEO. A. HENSON, R. M. MOODY and JAMES DUNLAP, *Appellees,*

1991

CONSOLIDATED CAUSES.

On Appeal From the United States Circuit Court for the Western District of Washington, Northern Division.

HON. C. H. HANFORD, District Judge.

Brief of Patrick Halloran, Appellee

CHARLES W. DORR,
HIRAM E. HADLEY,
Solicitors for Appellee.

PIPER & HESS, 722 Fourth Avenue.

FILED

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AMERICAN BONDING COMPANY, of Baltimore, Maryland, *Appellant,* vs. R. O. WELTS, NICK BESSNER, GEO. A. HENSON and W. J. HENRY, *Appellees,* AMERICAN BONDING COMPANY, of Baltimore, Maryland, *Appellant,* vs. PATRICK HALLORAN, GEO. A. HENSON, R. M. MOODY and JAMES DUNLAP, *Appellees,* AMERICAN BONDING COMPANY, of Baltimore, Maryland, *Appellant,* vs. GEO. A. HENSON, R. M. MOODY and JAMES DUNLAP, *Appellees,*	No. ....

CONSOLIDATED CAUSES.

On Appeal From the United States Circuit Court for the Western District of Washington, Northern Division.

HON. C. H. HANFORD, District Judge.

Brief of Patrick Halloran, Appellee

THE CASE AGAINST HALLORAN.

Briefly stated, the bill discloses the following facts:

At the general election of November, 1904, one Fred Blumberg was elected county auditor

and ex-officio clerk of the board of county commissioners of Skagit County, Washington, and appellee Halloran was elected county treasurer of said county, both elections being for a two-year term commencing on January 9th, 1905 (the 2nd Monday), and ending on January 14th, 1907.

Appellant furnished the official bond for the county auditor, Blumberg.

Both officials qualified and served respectively for their full term of office.

During the said two year term, the appellees Henson, Moody and Dunlap constituted the board of county commissioners of said county.

Blumberg, as county auditor, during his said term of office, by means of issuing and circulating fraudulent county warrants, became a defaulter and an embezzler of county funds.

The spurious warrants so issued were all fair and regular on their face and were paid by Halloran as county treasurer in due course in the performance of his official duties under the law, without notice or knowledge of any irregularity.

There is no intimation in the bill that Halloran knowingly or intentionally participated in the fraud by which the county was swindled by Blumberg.

The appellee, Halloran, during his said term of office, had regular quarterly settlements with the board of county commissioners as required

by law, and was given credit for all the paid warrants which form the basis of this suit, the same having been paid from time to time in the general course of the treasurer's business upon presentation or upon call.

There is no averment in the bill of complaint which negatives the presumption that these warrants were all duly registered and certified to the treasurer by the county auditor in advance of presentation and payment as required by statute.

Shortly after the expiration of Blumberg's term of office, to-wit: in the month of February, 1907, said Blumberg became a suicide, and thereupon his defalcations were discovered, and actions at law were commenced by Skagit County against the complainant and appellant in this suit, as Blumberg's surety on his official bond as county auditor, and also against Blumberg's estate, recovery being had in the Superior Court of Skagit County. Thereafter, appellant prosecuted an appeal to the Supreme Court of the State of Washington, where judgment in favor of the county was sustained. (59 Wash. 8) (Bill of complaint Record, p. 2-18.)*

Appellant thereafter paid the judgment and now seeks to recoup from the appellee Halloran, as former county treasurer and from his co-defendants and appellees Henson, Moody and Dunlap

---

*The references are to the printed transcript of the Record.

as former county commissioners, upon the theory that appellees all became jointly liable to the county with Blumberg for the latter's defalcations, because they failed to detect and prevent the auditor's stealage.

The bill of complaint was filed on November 30th, 1910 (Record p. 19).

Appellant is seeking to maintain this suit under the equitable doctrine of subrogation, by which it asks to be subrogated to the original rights of Skagit County, insisting that the county formerly had a cause of action against the appellees in this suit, including Halloran the ex-treasurer, for the defalcation of Blumberg, the county auditor, not upon any theory of knowledge, connivance or participation on the part of appellees or either of them, but solely upon the ground of negligence which is charged against them, in not having known of the purpose and prevented the peculations of the defaulting county auditor.

A demurrer to the bill upon the grounds that the action is barred by the statute of limitations, and for want of equity, was interposed and sustained by the court below (Record pp. 19, 20, 23, 24). Whereupon complainant, refusing to further plead, appealed, and has assigned as error the order of the court in sustaining the demurrer and dismissing the bill (Record p. 32).

First Point.

The suit is barred by the Statute of Limitations of the State of Washington.

It is contended on the part of appellant that the statute of limitations commenced to run against it only from the time it paid the county's judgment; or if appellant is held to the county's original position with respect to limitations, then the six year, and not the three year statute, controls.

On the other hand, appellee contends that the three year statute is applicable, and that the full period of limitation having run against the county, before the commencement of this suit, it had necessarily likewise run against appellant as the county's subrogee, and is therefore a complete bar to the action.

It is conceded that this suit was not commenced until after the expiration (by some nine months) of three years from the time the county's alleged cause of action accrued against appellee.

Appellant is seeking subrogation to an alleged right of action which it insists the county originally had against Halloran and the other county officials, by whom, it is claimed, because of their alleged misfeasance in office, it was made possible for the defaulting auditor to carry on his peculations.

Such an action, if at all, would exist originally in favor of the county, only on the implied liability

of the appellee, and cannot be construed to be one on a written obligation, and especially so when the sureties of the treasurer and other officials are not made co-defendants.

How, then, can appellant, who derives its right to sue, if at all, only through the county, by subrogation, and sues the officials alone, ignoring their bondsmen, contend as it does, that this action falls within the six year period of limitation applicable to suits based upon written obligations?

If, however, this suit could possibly be construed to be one on an official bond, the three year statute would nevertheless govern as that question is *stare decisis* in the State of Washington.

The statute is found in Remington & Ballinger's Code, Vol. 1, p. 215, Sec. 159, subdivision 3.

"Within three years—
3. An action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument."

The same statute was shown in Ballinger's Code, Sec. 4800 and in Hill's Code, Sec. 115.

As early as 1898 the question of the application of the proper statute in these cases, came squarely before the Washington Supreme Court for decision. The only question involved was whether the six or the three year statute controlled the maintanence of suits against county officers and their official bondsmen. The statutes were then con-

strued and the law of Washington was definitely settled and declared to the effect that such actions are governed by the three year statute of limitations. This doctrine is based upon the theory that the bond is a collateral security for the performance of a duty prescribed by statute and that any cause of action thereon must arise primarily from a breach of such statutory duty and not of any contractual obligation.

We refer to *Spokane County vs. Prescott,* 19 Wash. 418, an action brought by the county against its treasurer and his official bondsmen more than three years (by 13 days), after the cause of action accrued—that is after the expiration of the treasurer's term of office.

It was contended by the county that the six year statute governed, upon the theory that the suit was upon a written instrument, to-wit: the bond, but the court construed the three year statute as applying and held that the county's cause of action was barred.

We quote from the opinion of the Supreme Court of Washington (19 Wash., p. 421) as follows:

"One of the duties of the treasurer required by the statute was the payment of the money in his possession belonging to the county to his successor in office. The liability arose when he neglected or refused to make such payment. Certainly, the cause of action accrued at that date. The undertaking of the sureties was collateral security for the performance of the duties of their

principal. The bond itself is security that an officer will discharge his duties. His failure to discharge them is a breach of a statutory duty. The bond does not impose any obligation upon him different from that created by the statute. If he had executed no bond, but had assumed the functions of the office, and collected moneys, the duty would still be imposed upon him to pay them over to his successor. The bond is collateral security, as set forth in *Walton vs. United States,* 9 Wheat. 656."

The foregoing announced principles and construction are reaffirmed and followed by the Washington Supreme Court in,

Dickman vs. Strobach, 26 Wash. 558.

Johnson Service Co. vs. Aetna Ins. Co., 46 Wash. 434.

Skagit County vs. American Bonding Co., 59 Wash. 1.

It is thus manifest that had this suit been brought by the county against Halloran and his bondsmen, the three year statute must have served as an effectual bar.

Appellant contends (Appellant's brief, p. 47) that the construction of the statute of limitations found in the above cases is a holding "of general law merely, and not the construction of a state statute by which the United States courts are bound."

No authorities are cited to sustain this view of appellant's counsel and it is not probable that

any could be found. The correct rule is stated as follows:

"The law of any state of the Union, whether depending upon statutes or upon opinions, is a matter of which the courts of the United States are bound to take notice without plea or proof. It thus appears that the courts of the United States have jurisdiction to administer a jurisprudence not wholly or chiefly within the domain of Congress. They administer between the proper parties the jurisprudence of the states. They are governed like the state courts by the valid statutes of the state. Where no federal question is involved, they follow the decisions of the highest court of the state in its construction of its own constitution or other written laws."

Lewis' Sutherland Statutory Construction, 2nd Ed., Vol. II, Sec. 313, pp. 613-614.

Chief Justice Marshall said in *Elmendorf vs. Taylor,* 10 Wheaton 152-160:

"We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction, than to depart from the words of the statute. On this principle, the construction given by this court to the constitution and laws of the United States is received by all as the true construction; and on the same principle, the construction given by the courts of the several states to the legislative acts of those states, is received as true, unless they come in conflict with the constitution, laws, or treaties of the United States. If, then, this question has been settled in Kentucky, we must suppose it to be rightly settled."

The federal courts are bound by the inter-

pretation put on the statute of limitations by the state courts.

"The limitations of actions in the state courts for the enforcement of rights which are not dependent upon acts of Congress or upon the constitution is a matter purely of state regulation, which the federal courts must follow when such actions are transferred to them."

Mitchell vs. Clark, 110 U. S. 633.
McClaine vs. Rankin, 197 U. S. 154.
Ross vs. Duval, 13 Peters 45.

Equity follows the law and applies the same period of limitations.

Wagner vs. Baird, 7 How. 234.
Note to Frame vs. Kenney, (Ky.) 12 American Decisions, pp. 368 *et seq.*

Having shown that this action is governed by the three year statute, the next question relates to the time when the statute began to run.

The defalcations of the county auditor were discovered, and became known to the county and its officials in February, 1907, at which time Blumberg, the county auditor, whose term had expired on January 14th, 1907 (Par. IV, Bill Record p. 5), became a suicide, and two actions at law were commenced by Skagit County against Blumberg's estate and appellant as surety on Blumberg's official bond. (Par. XV, Bill Record p. 16.)

Waiving the point of the running of the statute from January 14th, 1907—the date of the expiration

of the official term of office—which we think is the true rule, there can be no doubt that the statute was put into operation by the discovery of the shortage and the commencement of the actions at law by the county, in February, 1907, and as more than three years had elapsed between said date, and the commencement of this suit, in November, 1910, the bar had become complete against the county if the three year statute applies.

Appellant however argues that even though the three year statute does apply in general it cannot be invoked against its right to maintain this suit, as the statute did not commence to run against appellant until it paid the county's demand against its principal to-wit: from a date subsequent to the 10th day of June, 1910. (Par. XV, Bill Record p. 16.)

But it must be remembered that appellant is praying a court of equity to place it in the shoes of Skagit County with respect to its rights of action against appellees who are outside parties.

If appellant seeks subrogation in equity under the county, it must assume the county's position subject to all of the county's limitations. Appellant's rights and limitations must be measured and determined by applying the rules as though the county were the complainant. Appellant may not take the benefits and reject the burdens, but it must literally step into the county's shoes, and therefore if the cause of action against Halloran would be

barred in the hands of the county, it is likewise barred in the hands of one claiming through the county.

And if the county's cause of action is barred by reason of the statute, the same cause of action in the hands of another is likewise and for the same reasons barred. Any other rule would be to invest the assignee with something more than the assignor possessed, to enlarge the statute by a mere fiction, in fact to destroy the true principle of equitable subrogation as applied in cases of this nature, a doctrine which has its origin in a sense of natural justice, and puts one man in the exact place of another by reason of the special equities of the case.

A surety might, under appellant's reasoning, enforce an obligation which at the same time was barred to the creditor. This is not contemplated in the doctrine of subrogation. The courts have uniformly held for at least a century that the subrogee acquires no rights which the creditor did not have.

"But he (the subrogated surety) can acquire no rights that the creditor had not, and cannot therefore, compel a contribution by the representatives of his deceased co-security, against whom the creditor had no remedy."

Water's Rep. vs. Riley's Adm. (Maryland 1828), 18 Am. Dec. 302.

The situation is analagous in principle to that disclosed in *Cressy vs. Meyer,* 138 U. S. 525.

We quote from the opinion delivered by Mr. Justice Brewer (pp. 527-528).

"One proposition alone requires notice. This was an action by a creditor of the state not against his debtor, but against its debtors, to secure an appropriation of their debts to it to the satisfaction of its obligations to him. It is a proceeding of a garnishee nature. * * * Conceding that such a suit is proper, it still remains in the nature of a personal action by one individual against another. As against such a suit, laches and limitations are in a court of equity sufficient defences. The settlement, which was practically between the state and its debtors, was made in 1847. Thirty-six years thereafter this bill is filed. If the time for full payment given by the settlement of 1847 is subtracted, this suit was commenced nineteen years after the time fixed by that settlement for the last payment had passed. Limitation and laches forbid that this suit should be sustained."

So we say in the case at bar that laches and limitations forbid complainant to proceed upon a cause of action which had become barred by the statute, before the suit was instituted.

We admit that appellant's theory, i. e. that limitation will not run until a right of action has accrued, is a correct general statement of law, to which however, we might add from its citation that "when it is determined at what time a particular right of action accrues, the question whether the statute of limitations has begun to run is at once solved, unless the case falls within some exception." (25 Cyc. 1068, note 20.)

That is the precise point in the case at bar. The subrogee was not always capable of maintaining the action, but derives its right through the obligee, and upon payment to him steps into his shoes so far as this right of action is concerned, and thereby acquires the original rights and limitations of the obligee, nothing more nor less. The true question is: When did the county's cause of action accrue against Halloran? Not, when did appellant step into the county's shoes.

"Subrogation is the substitution of one person or thing for another. Here it is the substitution of one holder of a claim for another. But one who holds the rights or claims of another by subrogation takes them subject to the limitations and disqualifications attached to them in the hands of his predecessor."

Swarts vs. Siegel, 117 Fed. 13-15.

"The rights acquired by a party entitled to subrogation cannot be extended beyond the rights of the party under whom subrogation is claimed. Subrogation contemplates some original privilege on the part of him to whose place substitution is claimed, and where no such privilege exists, or where it has been waived by the creditor, there is nothing on which the right can be based. While a surety who pays the debt of his principal is subrogated to the rights of the holder of the claim, he takes such rights subject to all disqualifications and limitations which attached to them in the hands of his predecessor."

27 A. & E. Ency. of Law, 206.

"A surety who discharges his liability by the payment of his principal's debt does not thereby

relieve the principal from liability to pay it, but he subrogates himself to the rights of the former owner of the claim and stands in his shoes."

Swarts vs. Seigel, 117 Fed. Rep. 13-16.

Morgan vs. Wordell (Mass.), 59 N. E. 1037; 55 L. R. A. 33.

The rule for which we are contending is well stated in *American Bonding Co. vs. National Mechanics Bank* (Md.), 55 Atl. 395, wherein it is said (p. 398):

"The appellant, being subrogated to the right of the state in respect to its claim against the appellee, is entitled to the benefit of every right, lien, and security which existed in favor of the state in reference to the claim. Among these may properly be classed the state's exemption from the running of limitations against it. In *Orem vs. Wrightson, supra,* it was held that a surety who had paid the debt of the principal to the state was entitled to enjoy by subrogation the right of priority over other creditors in the distribution of the assets of the principal debtor which would have existed in favor of the state as a creditor had the claim been asserted by it. The reasoning which led our predecessors to the conclusion there arrived at, requires us to hold that the present appellant is entitled to stand in the state's position in reference to its claim against the appellee, and enjoy its exemption from the operation of the statute of limitations."

It should be observed, that the Supreme Court of Maryland refused to apply the statute in the above mentioned case, solely upon the ground that the state in its sovereignty was exempt from its operation; but the opinion illustrates the point which

we are attempting to make clear, i. e. that the subrogee stands in the shoes of the subrogor. If the State of Maryland had not been exempt from the running of limitations against it, those limitations would necessarily have been applied to the state's cause of action in the hands of its subrogee or equitable assignee, but because the state was exempt so was the subrogee exempt, the rule must work both ways.

In *Pond vs. Dougherty* (Cal.), 92 Pac. 1035, also the court held that the appellant who was a surety on the bond of a defaulting government official having paid the claim of the United States was:

"Subrogated to every right and remedy that the United States might have had, including exemption from the operation of statutes of limitations and statutes of nonclaim." (p. 1037.)

Here again we find the subrogee exempt from the operation of the statute because his subrogor was exempt.

Even if the county had been excepted from the operation of the statute of limitations, and might now maintain this action, because of its exemption, the Supreme Court of the United States has held upon analogy (*Cressy vs. Meyer,* 138 U. S. 525) that the right of the subrogee to sue would be barred and that the statute commenced to run against the subrogee at the time the state could have brought the original action, although the state

itself was exempt from the operations of the statute. This is against the doctrine of the Maryland Supreme Court in *American Bonding Co. vs. National Mechanics Bank* (*supra*), which extends the benefits of the state's exemptions to the subrogee, but it emphasizes the rule here contended for, that under no situation can the time within which to commence an action be enlarged in the hands of a private subrogee.

In the State of Washington, however, a county is not exempt from the running of the statute, as has been shown by *Spokane County vs. Prescott,* 19 Wash. 418 (*supra*), therefore the subrogee of the county cannot be exempted from the effect of the three year statute in this state, which applies to the county's cause of action.

It has been expressly held by the Supreme Court of Washington that the subrogee of a city is subject to the same limitations of time as was given to the original holder of a claim.

"Under the act of 1895 (Bal. Code, Par. 1150; P. C., Par. 3637), an action by the city to enforce its lien would be barred in ten years after delinquency. If at the time of the commencement of this action more than ten years had elapsed since the original delinquency to the city on the special assessments afterwards paid by appellant, his equitable lien therefor would be barred; otherwise not. Although he is entitled to be subrogated to the rights of the city, he cannot hold a lien for any longer time than the city itself could have successfully assetted the same. While on equitable principles he

succeeds to the rights and lien of the city, it is manifest that he can acquire nothing more."

Childs vs. Smith, 51 Wash. 461-462.

In the case of *Cathcart vs. Bryant* (28 Wash. 31), the Supreme Court of this state was called upon to determine whether a right of action, by a surety, on a judgment to which the surety became subrogated upon payment, was barred after a lapse of six years from date of entry of the judgment, or whether the action was to be governed by the statute applicable to implied promises for contribution, namely, three years. The court decided that the former was the correct rule and that the statute began to run from the date of entry of the judgment. The court said in part (p. 34):

"By being subrogated to the rights of his judgment creditor, the appellant could acquire no greater rights in the judgment than his judgment creditor had therein, and we held in the recent case of *Citizens' National Bank vs. Lucas,* 26 Wash. 417 (67 Pac. 252), where the question is fully discussed, that a judgment creditor could not maintain an action upon a judgment after the lapse of six years from the date of its entry. As more than six years elapsed between the time of the entry of the judgment sued upon and time of the commencement of this action, and, as this fact appeared on the face of the complaint, the demurrer thereto should have been sustained."

The application of the statute of limitations to the remedy of subrogation as it arises in the case at bar, seems at first glance to be a complex question—one which has often been difficult to determine

and apply and one on which there are many apparently conflicting decisions. The chief difficulty lies in the confusion of the different relations of principal, surety, co-surety, and joint wrongdoers, and the failure to apply to each, respectively, the principle applicable.

It should be remembered that there are two distinct causes of action, one of contribution, and the other of subrogation. They may exist together, or may be alone. Confusion often arises from applying to an action for contribution, the limitations applicable to subrogation, or vice versa.

> *Pomeroy's Equity Jurisprudence,* Vol. 6, pp. 920-1, note 62.

The latter is precisely what appellant is attempting to do in the present case. Appellant argues as though this was a direct proceeding, as in assumpsit, against its principal, Blumberg, or against a co-surety for contribution, instead of a suit against third parties to enforce a claim acquired through subrogation from the creditor. Upon that theory, appellant has cited several authorities with which we have no quarrel, but the theory of appellant is wrong, as is pointed out by Mr. Pomeroy in his treatise on Equitable Remedies.

> *See Pomeroy's Equitable Remedies,* Vol. II, pp. 1508-9, Sec. 924.

We concede that if the American Bonding Company was suing Blumberg to recoup for dam-

ages which it had suffered by reason of its being compelled to pay Blumberg's shortage, or was suing a co-surety, appellant's cause of action would not have accrued until it paid, and consequently the statute of limitations would not have commenced to run against it prior to the time of payment. But such is not the situation here. Appellant is demanding that it be substituted for the county to the county's alleged original rights to sue other and different parties upon an entirely independent cause of action, and is even asking that it be permitted to sue those whom it had agreed to protect and save harmless against any loss from Blumberg's acts.

"The doctrine of subrogation is of wide extent and operation in various departments of equity jurisprudence. * * * Being a doctrine of purely equitable origin and nature, its operation is always controlled by equitable principles. It is therefore, never enforced so as to defeat or interfere with the superior or equal equities of third persons, or with the legal right of third persons growing out of express contract."

Note to Sec. 1419,, Pomeroy's Equity Jurisprudence, Vol. IV, 3rd Ed. p. 2795.

The bar of the statute of limitations was an important element in the express contract between the county and its official treasurer, which the latter was always privileged to use as a defense to the county's action, had he been sued by the county.

Appellant complains that it could not have a cause of action until it paid the county's judgment, but overlooks the points, that it might have paid

within three years, or it might have brought appellee into the state court case against it, and there have had the rights of all parties litigated and determined.

> *Skipwith vs. Hurt* (Texas), 60 S. W. 423-425.

Not having acted within the statutory period, appellant cannot now complain of its own negligence.

> "The weight of authority and reason seems to be that when the respondent had the option at any time to obtain leave of court to bring its action, and did not ask for such leave, it cannot enlarge the statute of limitations by its own delinquency."
>
> *Spokane County vs. Prescott,* 19 Wash. p. 425.

Appellant assumes in concluding its brief (pp. 57-58) that it was not liable to the county upon its bond of indemnity until the court of last resort had so adjudged. This is an incorrect assumption. Appellant's liability to the county was the same before as after the litigation in the state courts. The only effect of the county's suit against appellant was to enforce that liability by securing judgment and execution. The court compelled appellant to pay only what it was originally bound by its contract to pay. No liability was created by the judgment that did not exist against appellant after defalcation and before suit. It became the duty of appellant to make the auditor's peculations good, as soon as the loss was ascertained. That is what its bond stood for and what it had guaranteed to

do, and its present appeal to the conscience of an equity court to disregard the bar of the statute of limitations which appellant has permitted to intervene through its own dilatory litigation with the county, sounds both in derision and travesty. Had appellant designed to pursue appellee it could have seasonably paid its obligations to Skagit County, and thus escaped the bar of the statute, but instead of paying its honest obligation, it sought in every conceivable technical way in the courts to avoid the just and legal consequences of its bond, even as to a considerable portion of the claims by resorting to the defense of the limitation bar against the county, which it now asserts has not yet run against it.

> See two cases. *Skagit County vs. American Bonding Co.*, 59 Wash. 1-8 (which should be read together).

Appellant was in no sense bound to refuse to pay until the Supreme Court compelled payment, but having so procrastinated, it should not now be heard to complain, because the limitation statute has run against its subrogor and therefore necessarily against appellant.

Therefore, because, 1st, the three-year statute governs, 2nd, the surety acquired his right of action subject to the limitations in the hands of the creditor, 3rd, the statute has run against the county and therefore against the subrogee, which proposition being clearly decided by the Supreme Court

of this state, is binding upon the Federal Courts; and, 4th, appellant could have had Halloran's liability determined within the statutory time, and is therefore guilty of laches; from any point of view the alleged cause of action against appellee Halloran, was barred more than nine months before this suit was commmeced.

Second Point.

The county never had a right of action against the treasurer.

It is alleged in appellant's bill that the defendant treasurer together with the auditor and county commissioners, sustained the relation of joint trustees or fiduciaries, being jointly and severally charged by law with performance of certain duties, etc. (Par. VI., Bill Record, p. 6.)

This is an incorrect statement of the law.

The duties of the county officers are clearly defined by statute. To support any action for misfeasance or malfeasance, there must be shown a breach of such statutory duties.

The duties of the county treasurer, with respect to the receipts and disbursements of funds, and accounting therefor are set forth in Remington & Ballinger's Codes and Statutes of Washington as follows:

Sec. 3940. To Receive and Disburse Moneys.

"He (the treasurer) shall receive all moneys due and accruing to the county and disburse the same on the proper orders issued and attested by the county auditor. Upon receipt of all moneys other than taxes he shall issue his receipt therefor in duplicate, one of which receipts he shall deliver immediately to the person or persons making such payment, and the duplicate of such receipt must be immediately filed by such treasurer in the office of the county auditor."

Sec. 3945. Payment of Warrants—Interest.

"He (the treasurer) shall pay all orders of the county auditor when presented, if there be money in the treasury for that purpose, and write on the face of such order the date of redemption, and his signature. If there be no funds to pay such order when presented, he shall indorse thereon, "Not paid for want of funds," and the date of such indorsement, over his signature, which shall entitle such order thenceforth to draw legal interest: Provided, etc., etc., * * * "

Sec. 3951. General Statement to County Commissioners at July Session.

"The treasurer of each county must, at the regular July session of the board of county commissioners, make a verified statement to said board showing the whole amount of his collections during the preceding year (stating particularly the source of each portion of the revenue) from all sources paid into the county treasury, the funds among which the same was distributed, together with the amount to each fund, the total amount of warrants certified to him by the county auditor, the total amount of warrants paid by him during the same time and the total amount of warrants remaining unpaid on the thirtieth day of June immediately preceding, and the funds on which the same are

drawn, and generally make a full and specific showing of the financial condition of the county."

Sec. 3954. Settlements at Quarterly Sessions of Commissioners.

"Each county treasurer shall attend with his books and vouchers before the board of county commissioners at the regular quarterly sessions of said board in January, April, July and October of each year and settle his accounts before said board:

1. For all money received by him, filing a certified statement, showing under separate headings amounts received from each and every source;

2. For all moneys disbursed by him since the date of the last preceding settlement, and in such settlement the board must allow the treasurer the following credits: (1) The amount of principal and interest paid on account of redemption of warrants issued upon the several funds of the county; (2) The amount paid the state treasurer since the last preceding or quarterly settlement, as per vouchers; (3) The amount paid on account of redemption of orders issued by the several school districts of the county; (4) All claims for credits or disbursements not above specified. He shall at such settlement also present, together with such vouchers and claims for credits, a certified list of such vouchers and claims arranged numerically under the separate headings of the funds from which such vouchers have been paid or on which such claims have accrued, or are made, which list must be checked, compared and made to correspond with the treasurer's books and vouchers by the board of county commissioners and the auditor at the time of such settlement. On completion of such comparison, such list, when found to be correct, shall be certified to by the chairman of said board and attested by the auditor, and shall, together with the vouchers and claims presented,

be filed in the office of said auditor, and such county treasurer be given credit therefor on the record of proceedings of said board, said record to show the amount credited on account of each fund, and whether for principal or interest. The auditor shall thereupon deliver to the county treasurer a transcript of such order and shall forthwith proceed to credit such officer with the sums therein specified."

Under the chapter on County Auditors we find:

Sec. 3915 makes the County Auditor ex-officio clerk of the Board of County Commissioners, and Sec. 3917 prescribes his duties as such clerk.

Sec. 3921. Account Current to Be Kept With County Treasurer.

"He (the auditor) shall keep an accurate account current with the treasurer of the county and shall charge him with all moneys received as shown by his receipts issued, and shall credit him with all disbursements on account of moneys paid out according to the record of the settlements of said treasurer with the board of county commissioners."

Sec. 3927. To Register Warrants.

"It shall be the duty of the county auditor, not earlier than ten days after the adjournment of the board of county commissioners, at any regular, adjourned, or special term of said board, and not earlier than ten days after the receipt of any superior court cost bill, to make out a register of all warrants legally authorized and directed to be issued by such board of county commissioners or such cost bill and to make out under his hand and seal of office a certified copy of such register

of warrants, and to forthwith deliver the same to the treasurer of the county, who shall record the same in a book to be kept by him for that purpose, and file and carefully preserve the original in his office for future reference. The register of warrants hereby authorized to be made by the county auditor shall be part of the records of such county and shall have the force and effect of the same."

Sec. 3929. To Examine Books of Treasurer.

"The auditor must, between the first and tenth of each month, examine the books of the treasurer, and see that the same have been correctly kept."

Sec. 3930. To Count the Money in the Treasury Quarterly.

The board of county commissioners and county auditor must, at the January, April, July and October settlements with the county treasurer, count the money in the county treasury, and make and verify in duplicate statements, showing:

1. The amount of money that ought to be in the treasury;
2. The amount and kind of money actually therein."

Sec. 3931. Restriction Upon Auditor, Etc.

"The person holding the office of county auditor or deputy, or performing its duties, shall not practice as an attorney, nor represent any person making any claim against the county, or seeking to procure any legislative or other action by said county board and the county auditor during his term of office, and any deputy by him appointed, is hereby disqualified from performing the duties of any other county office or acting as deputy for any other county officer. Nor shall any other

county officer or his deputy act as auditor or deputy, or perform any of the duties of said office."

Under the chapter on County Commissioners.

Sec. 3903. Examination of Accounts, Etc.

"At the July session, the board of county commissioners shall examine and compare the accounts and statements of the county auditor and county treasurer, aside from the regular settlement with such treasurer, and shall enter upon their record a summarized statement of the receipts and expenditures of the preceding year. At the January, April, July and October sessions, the board of county commissioners, together with the auditor, shall count the funds in the county treasury, and ascertain whether it contains the proper amount of funds."

Thus it will be seen that the treasurer is purely a ministerial officer. He is the custodian of the funds belonging to the county, and he must pay them out upon the proper orders issued and attested by the *county auditor.*

The orders presented for payment in the instant case were issued and attested by the county auditor and appeared on their face to be regular in every respect.

Under a state of facts similar to those shown by the bill in this suit, it was held by the Supreme Court of Kentucky, that no liability attached to the treasurer.

Harrison vs. Logan County (Ky.), 110 S. W. 377.

In that case, the Kentucky statutes are quoted as follows:

"It shall be the duty of said treasurer to receive and receipt for all moneys due, or to become due, to said county from the several collecting officers thereof, or from any other person or persons whose duty it is to pay money into the county treasury; all moneys so received by him to be held subject to the order of the fiscal court of the county."

By comparison of the statutes, the duties of the county treasurers in the state of Kentucky and in the state of Washington will be found to be similar.

The Kentucky court said, in *Harrison vs. Logan County (supra):*

"Thus it will be seen that the treasurer is purely a ministerial officer, and is the custodian of the funds belonging to the county, and must pay them out under the orders of the fiscal court. * *

"In the case at bar the action was brought by Logan County and its treasurer against its former treasurer and his surety to compel them to pay to it claims which it improperly allowed and directed him to pay, with which orders he complied. In our opinion it would be unjust to require him to refund this money to the county. He held the money as the statute provides, subject to the orders of the fiscal court. He was not a member of that court. He was not the legal adviser in any sense, of the county, nor did he have any supervisory power whatever over the fiscal court. He was merely a ministerial officer or agent of the county. He was subject to be removed at any time by the fiscal court for failure to obey its orders.

We know of no principle of law that will make an agent liable to his principal for money paid out in accordance to the orders and directions of the principal, even though it turns out that the principal afterwards discovers that the money was paid to a person not entitled to it."

110 S. W. Rep., p. 379.

To create any liability on the part of the treasurer, it must be shown that he *knowingly* participated in the wrongful acts of the auditor or that he paid out the sums in question under such circumstances as would charge him with notice.

Duckett vs. National Mechanic's Bank (Md.), 39 L. R. A., p. 87.

When a warrant apparently properly issued and attested by the auditor and fair on its face, was presented to the treasurer, it became his duty to pay the same, if the warrant had been registered and certified to the treasurer's office and sufficient funds were on hand. If the money was not on hand, the treasurer was required to endorse the warrant: "Not paid for want of funds" and to pay the same at some future date on call.

Rem. & Bal. Code, Sec. 3945 *(supra).*

Under a similar state of facts in *National Surety Company vs. State Savings Bank,* 156 Fed. 21 (C. C. A.), it is said (p. 25):

"The orders in question were apparently lawfully drawn, lawfully countersiged, and genuine. The natural and probable consequence of their issue

was their presentation to the treasurer, to whom they were addressed, and payment of them by him. The statutes of the state made it his duty to pay authorized orders of that kind. The surety company was liable to the county, because the presentation to the treasurer and the payment of the orders by him were the natural and probable consequence of their issue, and might have been reasonably anticipated by any prudent person."

How could the treasurer be chargeable with notice of the infirmities of any of the warrants mentioned in the bill when the warrants, good on their face, were properly certified in advance and were such as he was bound by law to pay upon presentation?

There are no facts averred in the bill sufficient to put the treasurer upon inquiry as to the malfeasance of the auditor. There is nothing in the law, or that is required by good morals, that would compel the treasurer to become a detective for the county, its officers or their bondsmen.

We do not contend for a moment that the treasurer could shut his eyes to wrongdoing, and escape the consequences for not seeing that which was visible, but we do insist that he was under no legal or moral obligations to investigate the office of the county auditor or the doings of the board of county commissioners to ascertain whether the warrants which were certified to his office, according to law, under the seal of the auditor's office, had been properly ordered or issued.

It was the duty of the auditor, under the law to check the treasurer's office, and see that his books were properly kept.

> Rem. & Bal. Code, Secs. 3921 and 3929 *(supra)*.

But it was not among the duties of the treasurer to check the accounts of the auditor or the board of county commissioners of which the auditor was the official clerk.

In *Wilson vs. Wall,* 6 Wall. 83, Mr. Justice Grier quotes with approval the following words from Lord Chancellor Cranworth (p. 91): "When a person has not actual notice he ought not to be treated as if he had notice unless the circumstances are such as enable the court to say, not only that he *might have acquired,* but also that he ought to have acquired it but for his gross negligence in the conduct of the business in question."

If it be urged that the treasurer was guilty of negligence in paying any of the warrants to Blumberg, instead of to the drawees named therein, our answer is, that there is nothing in those transactions which should put a reasonable minded man on notice that there was anything wrong with the warrants, or that any of the warrants which had been regularly certified, were spurious. It was the duty of the treasurer to pay the warrants; if he paid any of them to the wrong party, it might possibly raise a question between the treasurer and the proper

payee, but not so as between the county and the treasurer.

County warrants or orders are not negotiable instruments. There is nothing in the statute law of the state of Washington that requires them to be endorsed by the drawees. They are merely orders for the payment of specified amounts of money, drawn on the treasury by the auditor, and they must be paid by the treasurer on presentation, if there be money in the treasury for the purpose for which they are drawn.

> Rem. & Bal. Code, Secs. 3940 and 3945 *(supra)*.

The only purpose to be served by the writing of the name of the payee upon the back of the warrant, when it is redeemed by the treasurer, would be to satisfy the treasurer that he was paying to the proper party. It is therefore wholly immaterial that the treasurer did pay certain of these warrants or orders, which were endorsed substantially "John Doe, by Fred Blumberg, County Auditor." (Par. XII., Bill, Record, p. 13).

The essential thing to know is that the warrants or orders were fair and regular on their face, that they had been apparently duly issued by the auditor under the official seal of his office, and that they had been certified to the treasurer by the auditor. If so, when they were presented, paid and cancelled, the treasurer was merely performing his official and minsterial duties, and it does lie with

complainant to say that they were paid to the wrong parties. Upon payment the warrants were retired from circulation, and manifestly turned in to the board of county commissioners at the quarterly settlements. The demands against the county for which they stood, whether legal or illegal, were extinguished, and if the treasurer paid to the wrong party, that is not a matter that the county could complain of, nor can it be challenged by its subrogee.

In *Wall vs. County of Monroe,* 103 U. S. 74-77, Mr. Justice Field, speaking for the Supreme Court, said:

"The warrants being in form negotiable, are transferable by delivery so far as to authorize the holder to demand payment of them and to maintain, in his own name, an action upon them, but they are not negotiable instruments in the sense of the law merchant, so that, when held by a *bona fide* purchaser, evidence of their invalidity or defences available against the original payee would be excluded. The transferee takes them subject to all legal and equitable defences which existed to them in the hands of such payee."

Se also Daniel on Negotiable Instruments, 5th Ed., p. 451, Sec. 427.

It is averred in the bill, that the warrants were all issued by the county auditor in the performance of his official duties (Pars. VII., VIII., IX., Bill, pp. 7, 9, 11), and that the warrants were paid by the treasurer, Halloran, likewise in the performance of his official duties. (Par. VIII., Bill, p. 10.)

The penal code of the state prescribed severe penalties for the issuance of an illegal warrant.

Sec. 2880. Auditor Issuing Illegal Warrants.

"If any auditor shall knowingly issue any warrant not authorized by law, he shall, on conviction thereof, be imprisoned in the county jail not exceeding one year, and be fined in any sum not exceeding one thousand dollars or be fined only."

There is no suggestion in the bill of any fact, sufficient to put the treasurer on notice, that the auditor was violating the criminal laws.

The treasurer paid on the county's certified lists, and retired the warrants as they were paid, assuming that the certified registrations were correct, which the treasurer had the right to do. The county was not proximately hurt by paying the certified warrants, its injury occurring in the auditor's office when the warrants were falsely uttered and certified to the treasurer. The payment of the warrants was but the natural consequence of their issue.

It was the auditor's defalcations which created the only cause of action in favor of Skagit County, that is shown by the bill in this suit to have ever existed, and that cause existed alone against the auditor and his bondsmen, and it has been extinguished by the payment of the judgment rendered against appellant.

If the County of Skagit were here suing instead of appellant, in an original action to recover its

lost money, the suit would fail because no cause of action against the ex-treasurer is shown to have existed in favor of the county, and plaintiff, as the subrogee of the county, can have no better claim to sue the treasurer than the county would have had.

Third Point.

Estoppel.

If we admit for the sake of argument, the contention of appellant that the county formerly had a right of action against the treasurer, Halloran, then it must follow that Halloran, upon paying the county's judgment, could recover from the surety of the defaulting auditor whose misdeeds constituted the proximate cause of the county's loss. The Washington state statute so provides.

"Every official bond executed by any officer pursuant to law shall be in force and obligatory upon the principal and sureties therein to and for the state of Washington, and to and for the use and benefit of all persons who may be injured or aggrieved by the wrongful act or default of such officer in his official capacity, and any person so injured or aggrieved may bring suit on such bond in his or her own name without an assignment thereof."

Sec. 8326, Rem. & Bal. Code.

This precise question was discussed by Judge Adams in *National Surety Co. vs. State Savings Bank* (C. C. A., 8th Circuit), 156 Fed. 21.

In that case, the surety of a defaulting auditor, having paid the county's judgment, sought to recover from the bank which had bought the spurious warrants from the auditor, and later received the money on them from the county treasurer. In considering a statute of Minnesota, similar to the one set forth above, the court said (p. 24):

"If, by virtue of these statutes, the bank could have recovered from the surety company, as a matter of course the surety company cannot now recover from the bank."

In the dissenting opinion of Judge Hook, in which he makes a powerful argument against the right of the surety company to sue the bank, the principle is re-stated (p. 31):

"It is admitted at the threshold of this proposition that if the bank had sustained the loss, instead of the county, and could in such case have recovered from the surety company, of course, the latter cannot now recover from the bank."

It was held by the majority opinion in that case, that the sale of the warrants to the bank by reason of fraudulent representations of the auditor, was in no sense representative or official, but were acts altogether personal in their character, charging the bank with notice and differing from the presentation of the warrants to the treasurer. In delivering the opinion, Judge Adams said (p. 25):

"The orders in question were apparently lawfully drawn, lawfully countersigned, and genuine.

The natural and probable consequence of their issue was their presentation to the treasurer, to whom they were addressed, and payment of them by him. The statutes of the state made it his duty to pay authorized orders of that kind. The surety company was liable to the county, because the presentation to the treasurer and the payment of the orders by him were the natural and probable consequence of their issue, and might have been reasonably anticipated by any prudent person. Right here is the radical and decisive difference between the position of the county and that of the bank. While the payment by the county was, in the ordinary course of business, reasonable and probable, the purchase of the orders by the bank on the assignments made in the name of myths by Bourne was not the natural or probable consequence of their issue."

Upon the express ground that the bank, having suffered loss, by acquiring the warrants in such an irregular way, as to be charged under the law with notice of their illegality, could not have had recourse against the surety, the latter was allowed to maintain its action against the bank. But had the surety company sued the treasurer it would have been met by the estoppel which must arise in favor of the treasurer who redeems the warrants in the ordinary course of business, which is the natural and probable consequence of their issue, and who would have been entitled to recourse against the auditor and his bond, had he suffered by paying the illegal orders.

The acts of the auditor of Skagit County constituted the proximate cause of the loss in the

case at bar. It was these acts which complainant had guaranteed Halloran against, and had Halloran suffered by them, he must have been entitled to recourse on the bond. This is what the bond stood for.

"An act is the proximate cause of those results only which are its natural and probable consequences, and which ought to have been foreseen in the light of the attending circumstances."

National Surety Co. vs. State Savings Bank (supra), p. 24, citing *Milwaukee St. Railway Co. vs. Kellogg,* 94 U. S. 469-474; *Travellers' Ins. Co. vs. Melick* (C. C. A.), 65 Fed. 178, 184-185; *Citizens' Gas & Electric Co. vs. Nicholson* (C. A. A.), 152 Fed. 389-392.

The proximate cause of the county's loss, and incidentally, of the liability and loss of appellant in the case at bar, is the malfeasance of the county auditor, Blumberg. The payment of the spurious warrants, which appeared to be genuine, was the natural and proximate consequence of the unlawful acts of appellant's principal, and appellant cannot shift that loss to the shoulders of another, one whom it had guaranteed to protect against the consequences of the very thing which happened. That the acts of Blumberg, the defaulting auditor, were official acts, and were such acts as appellant had guaranteed the world against, has been determined by the State Supreme Court in the two cases of *Skagit County vs. American Bonding Co. (supra).* In one case it was said (59 Wash., pp. 6-7):

"Appellant further claims that the fraudulent and unauthorized issue of the warrants without consideration was not the act of Blumberg as county auditor, and that when he raised the other warrants he had in fact purchased them in his individual capacity, and that his acts in so raising them were not official acts, but forgeries. There is no question but that the various acts performed by Blumberg of which the respondent now complains were unauthorized; that they were not contemplated as a part of his official duties, and that they were illegally performed for his personal and private benefit. The appellant, however, executed a bond on his behalf, to secure the faithful performance of his duties as county auditor in every respect. The acts complained of were a violation of his duties as county auditor. Had he been a private citizen not holding any official position he could not have successfully perpetrated any of the frauds charged in the complaint. The fact that he was county auditor, had possession of the records of the office, the blanks upon which warrants were to be issued, the receipt the date of which was raised, and the other documents which he used in perpetrating these frauds, enabled him to perform acts of embezzlement, misappropriation, and dishonesty which he could not have performed as a private citizen. By executing a bond upon his behalf, the appellant contracted that he would be a faithful, honest, and efficient officer, and that he would conscientiously discharge all the duties devolving upon him. The duty devolved upon him not to make use of any of these blanks, books, records, or documents for the purpose of perpetrating a fraud and benefiting himself. Although it is contended with much force that these were not strictly official acts, they were, nevertheless, wrongful, dishonest, and unfaithful acts, which he performed while county auditor, which he could not have performed without being auditor, and which have resulted in great financial loss to the

respondent. We think, therefore, that no technical or specious arguments to avoid liability on the part of the appellant, a compensated surety, should be given any serious consideration, when such arguments are based solely upon the contention that acts such as these were not performed by Blumberg as auditor."

In the other case it was said (59 Wash., p. 13):

"The correct rule to be applied to the facts before us is well stated in the first syllabus of *Hall vs. Tierney,* 89 Minn. 407, 95 N. W. 219, in the following language:

" 'The object of an official bond is to obtain indemnity against the misuse of an official position for wrong purposes; and that which is done under color of office and which would obtain no credit except for its appearing to be a regular official act, is within the protection of the bond, and must be made good by those who signed it.' "

Therefore appellant ought to be estopped from suing Halloran, for the identical loss for which Halloran could sue appellant (as surety for the defaulting auditor), if Halloran were forced to pay. This suit of the surety is met squarely by the reciprocal and superior right of action in the treasurer. Appellant should not be permitted in equity to despoil that which it has agreed to protect and save harmless.

Upon the grounds that the suit is barred by the statute of limitations of the state of Washington, wherein it arose, and that the bill is wholly

wanting in equity, the judgment of the Circuit Court should be affirmed and we so ask.

Respectfully submitted,

CHARLES W. DORR,
HIRAM E. HADLEY,
Solicitors for Appellee, Patrick Halloran.

Address: 375 Colman Building, Seattle, Wash.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AMERICAN BONDING COMPANY, of Baltimore, Maryland,
Appellant.
vs.
R. O. WELTS, NICK BESSNER, GEO. A. HENSON, and W. J. HENRY,
Appellees.

AMERICAN BONDING COMPANY, of Baltimore, Maryland.
Appellant.
vs.
PATRICK HALLORAN, GEO. A. HENSON, R. M. MOODY and JAMES DUNLAP,
Appellees.

AMERICAN BONDING COMPANY, of Baltimore, Maryland.
Appellant.
vs.
GEO. A. HENSON, R. M. MOODY, and JAMES DUNLAP,
Appellees.

No. 1989 / 1990 / 1991

CONSOLIDATED CAUSES

On Appeal from the United States Circuit Court for the Western District of Washington, Northern Division.

HON. C. H. HANFORD, District Judge

Brief of Appellees

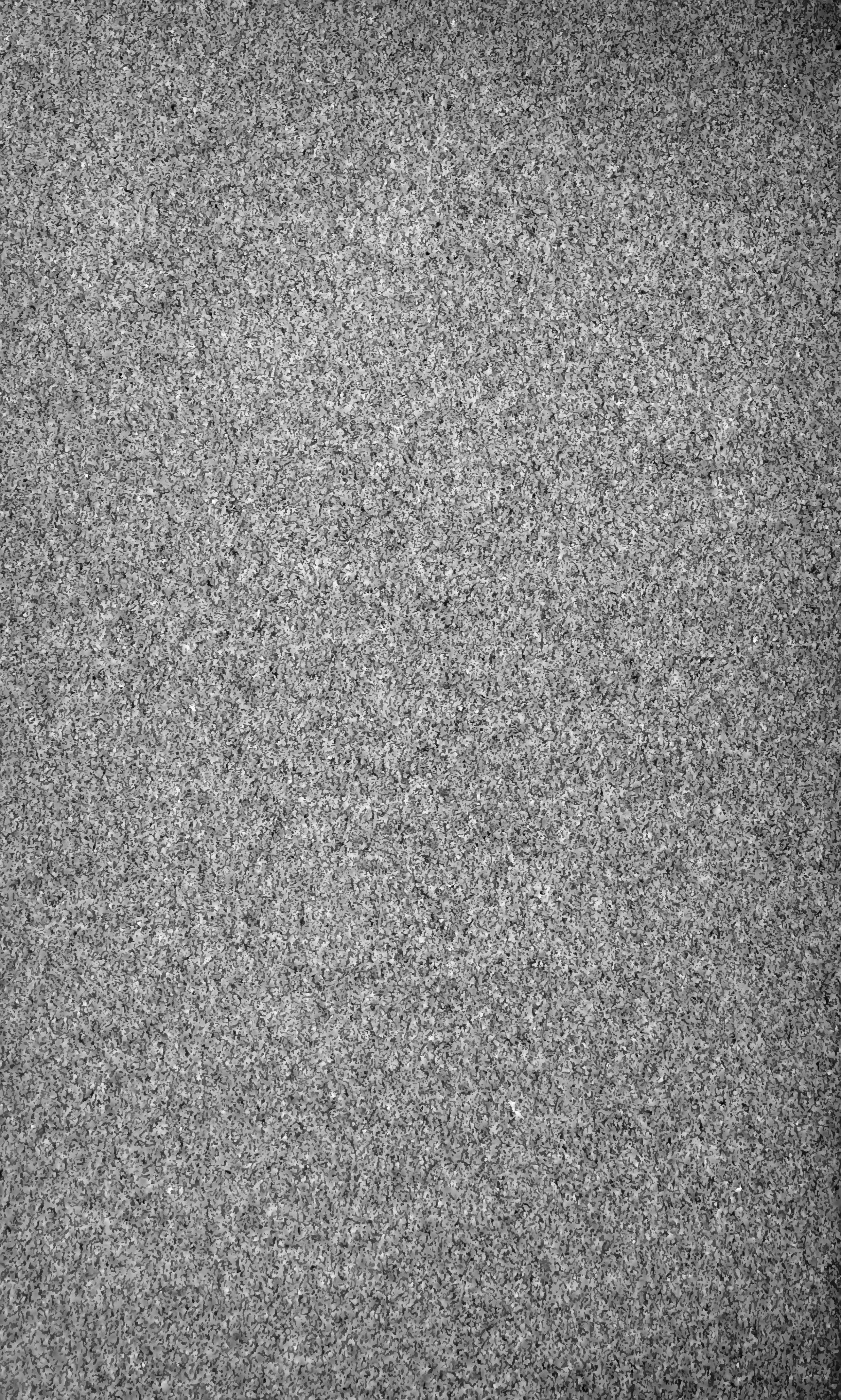
R. O. WELTS, NICK BESSNER, GEO. A. HENSON and W. J. HENRY.

E. C. MILLION,
J. P. HOUSER,
Solicitors for Appellees,
GEO. HENSEN, R. M. MOODY and JAMES DUNLAP.
Alaska Bldg., Seattle, Wn.

C. H. FARRELL,
J. H. KANE,
W. B. STRATTON,
Solicitors for Appellees,
WELTS, BESSNER, HENSON and HENRY,
734-9 Central Bldg., Seattle, Wash.

PRESS OF P. L. ALLEN

FILED



IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AMERICAN BONDING COMPANY, of Baltimore, Maryland,
Appellant.

vs.

R. O. WELTS, NICK BESSNER, GEO. A. HENSON, and W. J. HENRY,
Appellees.

AMERICAN BONDING COMPANY, of Baltimore, Maryland.
Appellant.

vs.

PATRICK HALLORAN, GEO. A. HENSON, R. M. MOODY and JAMES DUNLAP,
Appellees.

AMERICAN BONDING COMPANY, of Baltimore, Maryland.
Appellant.

vs.

GEO. A. HENSON, R. M. MOODY, and JAMES DUNLAP,
Appellees.

No.______

CONSOLIDATED CAUSES

On Appeal from the United States Circuit Court for the Western District of Washington, Northern Division.

HON. C. H. HANFORD, District Judge

Brief of Appellees

R. O. WELTS, NICK BESSNER, GEO. A. HENSON and W. J. HENRY.

E. C. MILLION,
J. P. HOUSER,
Solicitors for Appellees,
GEO. HENSEN, R. M. MOODY, and JAMES DUNLAP.
Alaska Bldg., Seattle, Wn.

C. H. FARRELL,
J. H. KANE,
W. B. STRATTON,
Solicitors for Appellees,
WELTS, BESSNER, HENSON and HENRY,
734-9 Central Bldg., Seattle, Wash.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AMERICAN BONDING COMPANY, of Baltimore, Maryland,
Appellant.

vs.

R. O. WELTS, NICK BESSNER, GEO. A. HENSON, and W. J. HENRY,
Appellees.

AMERICAN BONDING COMPANY, of Baltimore, Maryland.
Appellant.

vs.

PATRICK HALLORAN, GEO. A. HENSON, R. M. MOODY and JAMES DUNLAP,
Appellees.

AMERICAN BONDING COMPANY, of Baltimore, Maryland.
Appellant.

vs.

GEO. A. HENSON, R. M. MOODY, and JAMES DUNLAP,
Appellees.

No.——

CONSOLIDATED CAUSES

On Appeal from the United States Circuit Court for the Western District of Washington, Northern Division.

HON. C. H. HANFORD, District Judge

Brief of Appellees

R. O. WELTS, NICK BESSNER, GEO. A. HENSON and W. J. HENRY.

BRIEF OF APPELLEES, EXCEPT APPELLEE HALLORAN.

THE CASE AGAINST WELTS, BESSNER, HENSON AND HENRY, WHO WERE COUNTY TREASURER AND COUNTY COMMISSIONERS, RESPECTIVELY, OF

SKAGIT COUNTY, WASHINGTON, FOR THE TERM COMMENCING JANUARY 12, 1903, AND ENDING JANUARY 9, 1905.

At the general election of November, 1902, Fred Blumberg was elected County Auditor, ex-officio Clerk of Board of County Commissioners of Skagit County, Washington, and appellee Welts was elected County Treasurer of said county, both elections being for the term of two years, commencing January 12, 1903, ending January 9, 1905. At the said election the appellees Bessner, Henson and Henry were elected County Commissioners of Skagit County for the said term commencing January 12, 1903, and ending January 9, 1905. Appellant furnished the official bond of the County Auditor Blumberg. The said treasurer and said county commissioners qualified and served respectively for their full term of office.

Blumberg, as County Auditor, during his said term of office, by means of issuing and circulating fraudulent county warrants became a defaulter and an embezzler of county funds.

The spurious warrants so issued were all fair and regular on their face and were paid by Welts, as County Treasurer, in due course in the performance of his official duties under the laws, without

notice or knowledge of their irregularity. There is no intimation in the bill of complaint that Welts knowingly or intentionally participated in the fraud by which the county was swindled by Blumberg.

The appellee Welts, during his said term of office, had regular quarterly settlements with the Board of County Commissioners as required by law, and was given credit for all the paid warrants which form the basis of this suit, the same having been paid from time to time in the general course of the treasurer's business, upon presentation or upon call.

There is no averment in the bill of complaint which negatives the presumption that these warrants were all duly registered and certified to the treasurer by the county auditor in advance of presentation and payment, as required by statute.

It appears also from the bill of complaint that about June 4, 1903, one Frank Nixon, applied to the Board of County Commissioners for a retail liquor license and paid to Blumberg the fee therefor in the sum of $300.00, but that Blumberg fraudulently procured from appellee Welts a receipt issued to Nixon for the year 1902 and altered said receipt so that the same appeared to be a receipt for the year 1903, and presented the treasurer's receipt so

changed and the County Commissioners thereupon granted Nixon's application for license; that the license was thereafter issued by Blumberg who embezzled the $300.00.

The bill of complaint further alleges that the liability against the said commissioners arose from their failure to check, audit and examine the warrants so paid by Treasurer Welts and the list of warrants for the purpose of ascertaining that said warrants were valid obligations of Skagit County for which appellee Welts was entitled to receive credit, all of which is more fully shown by the bill of complaint set out from pages 2 to 17 of the transcript of record herein.

In the month of February, 1907, Blumberg committed suicide and during that month his defalcations were discovered and actions at law were commenced by Skagit County against the appellant in this suit as Blumberg's surety on his official bond as County Auditor, and also against Blumberg's estate, recovery being had in the Superior Court of Skagit County. Thereafter appellant prosecuted an appeal to the Supreme Court of the State of Washington where judgment in favor of the County was sustained (59 Wash. 8) (Record pp. 2 to 18).

Appellant thereafter paid the judgment and now seeks to recoup from appellees, Halloran, Bessner, Henson and Henry, as former County Treasurer and County Commissioners, respectively, upon the theory that said appellees all became jointly liable to the County with Blumberg for the latter's defalcations because they failed to detect and prevent the auditor's defaults. The bill of complaint against said Welts, Bessner, Henson and Henry was filed on August 12, 1910.

Appellant seeks to maintain this suit under the equitable doctrine of subrogation by which it asks to be subrogated to the alleged original rights of Skagit County, insisting that the County formerly had a cause of action against all said appellees in this suit for the defalcation of Blumberg, the County Auditor; not upon any theory of knowledge, connivance or guilty participation on the part of appellees, or any of them, but solely upon the ground of negligence which is charged against them in not having known of the purpose and prevented the peculations of the defaulting County Auditor.

A demurrer to the bill was filed separately by appellee Welts and Appellees Bessner, Henson and Henry upon the grounds that the action is barred by the statute of limitations and for want of equity

was interposed and sustained by the court below (R. pp. 18 to 21). Whereupon complainant refused to plead further, appealed and has assigned as error the order of the court in sustaining the demurrer and dismissing the bill (p. 29).

THE SUIT IS BARRED BY THE STATUTE OF LIMITATION OF THE STATE OF WASHINGTON.

The brief on file in this case on behalf of appellee Patrick Halloran fully argues this question and fully applies to appellees Welts, Bessner, Henson and Henry, and for the sake of brevity is adopted by said appellees. If the statute of limitations is a valid defense as to appellee Halloran, it is also a valid defense as to the above named appellees inasmuch as their terms of office expired two years before Halloran's term expired. The cause of action, if any, which Skagit County had against said appellees, arose on the expiration of their term of office, January 9, 1905, and the present action was not commenced until about five and one-half years thereafter.

The general principles of law argued by appellant on the question of limitations may be admitted. The error into which the appellant has fallen is the application it seeks to make of the law, or in other

words, in its claim that the law cited applies to the facts in the case at bar. For instance, many citations are made from Cyc. and from Brandt on Suretyship, which announce the general proposition that the statute of limitations does not run against the right until the cause of action has accrued; following this up with the argument that as the cause of action could not accrue until the judgment against the bonding company had been paid, therefore the statute of limitations would not begin to run until that time. This conclusion cannot be legitimately drawn from the general principle of law which appellant seeks to use as a premise. Appellant's argument does not reach the real question at all. The question is, does a subrogation arise so as to confer any rights on the subrogee where the original cause of action at the time of the alleged subrogation has been barred by the statute of limitations as to any rights of the principal creditor before the subrogation took place? On this proposition the appellant has failed to cite a single authority sustaining its contention or even an authority which is in point on the proposition, and in making this statement it may be conceded that as a general proposition of law the statute of limitations does not begin to run against the right until a cause of action has accrued, but in conceding this, it does not follow

that the point so conceded has anything to do with the real question involved in the case at bar. The case of *Burrus v. Cook,* 93 S. W. 888, 114 S. W. 1065, and *Power v. Munger,* 52 Fed. 705, cited by appellant, might, at first impression, seem to sustain appellant's contention but an examination of these cases will disclose that they have no bearing whatever upon the particular point at issue. In the case of *Burrus v. Cook,* two statutes of limitation were under consideration, one applying to the rights of a surety fixing the limitation at five years in which a surety could bring his action for reimbursement against the principal creditor, and another applying to judgment in which the limitation is twenty years. The Supreme Court of Missouri simply held that the case fell within the five year statute. The case is entirely devoid of any intimation whatever as to what the ruling would have been as to the rights of the surety or subrogee in a case where the statute of limitations had run against the principal creditor before the secondary liability was sought to be enforced by the surety or subrogee. In fact, no such question seems to have been raised or presented in the case of *Burrus v. Cook,* and we are not able to see where it has any application to the case at bar.

It will be noticed that in the case of *Power v. Munger,* 52 Fed. 705, cited by appellant, the question of subrogation, or suretyship, was not involved at all, but the case presented was considered as one presenting the question of a direct and primary liability arising in favor of the owners of the steamer McLeod against defendant Munger, who was a member of the firm of Weaver & Co., and the liability sought to be enforced was sustained on the theory that it was a direct liability and had nothing whatever to do with any rights created by the contract between Weaver & Co. and the owners of the steamer Butte; so it will be observed that the cause of action having been sustained on the theory that a direct liability was created independent of any rights arising out of the contract between the owners of the steamer Butte and C. S. Weaver & Co. the question of suretyship, or subrogation, was not and could not be involved in that case. The Court, in its opinion, is careful to point out this distinguishing feature as is evidenced by the following language:

"If, under the facts, then in evidence, it appeared that the plaintiff could not recover, except upon proof of the execution of the written contract between C. S. Weaver & Co., and the owners of the Butte, and a breach of its terms, then it might well be that the statute began to run at the date

of the breach, but in fact, plaintiff's right of action is not based upon a breach of this contract. It is based upon the allegations that Weaver & Co. having in their possession and control the steamer Butte, so negligently handled the same as to cause injury to the steamer McLeod, and that the plaintiff as one of the owners of the Butte has been compelled to pay the damages awarded to the owners of the McLeod."

Again, the Court desiring to make the point of distinction still plainer, says:

"Reimbursement is sought not for any injury to the property or property rights of the plaintiff, nor for the breach of any contract with him, but for money he has been compelled to pay to the owners of the McLeod for damages resulting to them from the negligence of Weaver & Co."

It is plain to be seen from the language used in this decision that had the rights of Power been derived by him from an assignment or subrogation to the rights of the owners of the steamer Butte under their contract with Weaver & Co., the decision would have been exactly the opposite. In this decision the case of *Wilcox v. Plummer,* 4 Pet. 172, is cited. An examination of that case and the subsequent cases in which it has been cited, will disclose the fact that the question of subrogation or suretyship has never been considered in those cases.

The cases of *Koscher v. Koscher; Pollock v. Wright; Haberman v. Heidreich* and *Darrow v.*

Sommerfield go no further than to consider the general principle of law to the effect that the statute does not run until the cause of action accrues which, as above stated, has nothing to do with the particular question involved in the case at bar.

THE APPELLANT IS NOT ENTITLED TO ANY RELIEF.

The appellant is not entitled to any relief because:

(a) The County never did have any right of action against the treasurer or commissioners.

(b) Even if the County did have a cause of action against the treasurer and commissioners, yet the appellant was not subrogated to that right to such an extent as to enable it to successfully maintain this suit.

As to proposition (a): This naturally divides itself into two parts: First, was there a liability in favor of the county against the commissioners; and second, was there a liability in favor of the county against the treasurer.

It is evident that the appellant's position is that the commissioners were liable to the county because of their alleged failure to comply with certain statutory requirements. So far as we have been

able to find, the statutes relating to the duties of commissioners are the following:

"The several boards of county commissioners are authorized and required, * * * 5. To allow all accounts legally chargable against said county not otherwise provided for, and to audit the accounts of all officers having the care, management collection, or disbursement of any money belonging to the county or appropriated to its benefit; * * *"

Sec. 3890 Rem. & Bal. Code.

"At the July session, the board of county commissioners shall examine and compare the accounts and statements of the county auditor and county treasurer, aside from the regular settlement with such treasurer, and shall enter upon their record a summarized statement of the receipts and expenditures of the preceding year. At the January, April, July and October sessions, the board of county commissioners, together with the auditor, shall count the funds in the county treasury, and ascertain whether it contains the proper amount of funds."

Sec. 3903 Rem. & Bal. Code.

"The board of county commissioners and county auditor must, at the January, April, July and October settlements with the county treasurer, count the money in the county treasury, and make and verify in duplicate statements, showing:

1. The amount of money that ought to be in the treasury;

2. The amount and kind of money actually therein."

Sec. 3930 Rem. & Bal. Code.

"Each county treasurer shall attend with his books and vouchers before the board of county com-

missioners at the regular quarterly sessions of said board in January, April, July and October of each year and settle his accounts before said board:

1. For all money received by him, filing a certified statement, showing under separate headings amounts received from each and every source;

2. For all moneys disbursed by him since the date of the last preceding settlement, and in such settlement the board must allow the treasurer the following credits: (1) The amount of principal and interest paid on account of redemption of warrants issued upon the several funds of the county; (2) The amount paid the state treasurer since the last preceding or quarterly settlement, as per vouchers; (3) The amount paid on account of redemption of orders issued by the several schools districts of the county; (4) All claims for credits or disbursements not above specified. He shall at such settlement also present, together with such vouchers and claims for credits, a certified list of such vouchers and claims arranged numerically under the separate headings of the funds from which such vouchers have been paid or on which such claims have accrued, or are made, which list must be checked, compared and made to correspond with the treasurer's books and vouchers by the board of county commissioners and the auditor at the time of such settlement. On completion of such comparison, such list, when found to be correct, shall be certified to by the chairman of said board and attested by the auditor, and shall, together with the vouchers and claims presented, be filed in the office of said auditor, and such county treasurer be given credit therefor on the record of proceedings of said board, said record to show the amount credited on account of each fund, and whether for principal or interest. The auditor shall thereupon deliver to the county treasurer a transcript of such order and shall forthwith proceed to credit such officer with the sums therein specified."

Sec. 3954 Rem. & Bal. Code.

The statutes defining the duty of the county treasurer are, in addition to Sec. 9354, *supra,* the following:

"He shall receive all moneys due and accruing to the county and disburse the same on the proper orders issued and attested by the county auditor. Upon receipt of all moneys other than taxes he shall issue his receipt therefor in duplicate, one of which receipts he shall deliver immediately to the person or persons making such payment, and the duplicate of such receipt must be immediately filed by such treasurer in the office of the county auditor."

Sec. 3940 Rem. & Bal. Code.

"He shall pay all orders of the county auditor when presented, if there be money in the treasury for that purpose, and write on the face of such order the date of redemption, and his signature. If there be no funds to pay such order when presented, he shall endorse thereon, "Not paid for want of funds," and the date of such endorsement, over his signature, which shall entitle such order thenceforth to draw legal interest; provided, that such interest shall cease from the date of notice, by publication in some newspaper printed or circulated in his county, to be given by the county treasurer, that there are funds to redeem such outstanding orders, which notice such treasurer shall give in such case; and if there be no such newspaper, then by posting such notice at three public places in such county."

Sec. 3945 Rem. & Bal. Code.

"All warrants drawn on the funds of the county shall be redeemed by the treasurer in the order of their issuance."

Sec. 3946 Rem. & Bal. Code.

"All county, school, city and town warrants shall be paid according to their number, date and issue, and shall draw interest from and after their presentation to the proper treasurer; provided, that no compound interest shall be paid directly or indirectly on any of said warrants."

Sec. 3947 Rem. & Bal. Code.

"The treasurer of each county must, at the regular July session of the board of county commissioners, make a verified statement to said board showing the whole amount of his collections during the preceding year (stating particularly the source of each portion of the revenue) from all sources paid into the county treasury, the funds among which the same was distributed, together with the amount to each fund, the total amount of warrants certified to him by the county auditor and the total amount of warrants paid by him during the same time, and the total amount of warrants remaining unpaid on the thirtieth day of June immediately preceding, and the funds on which the same are drawn, and generally make a full and specific showing of the financial condition of the county."

Sec. 3951 Rem. & Bal. Code.

"He shall so arrange and keep his books that the amount received and paid out, on account of separate and distinct funds, or specific appropriations, shall be exhibited in separate accounts, as well as the whole receipts and expenditures by one general account."

Sec. 3942 Rem. & Bal. Code.

The statutes defining the duties of the county auditor are as follows:

"He shall audit all claims, demands and accounts against the county which by law are charge-

able to said county, except such cost or fee bills as are by law to be examined or approved by some other judicial tribunal or officer. Such claims as it is his duty to audit shall be presented to the board of county commissioners for their examination and allowance. For claims allowed by the county commissioners, as also for cost bills and other lawful claims duly approved by the competent tribunal designated by law for their allowance, he shall draw a warrant on the county treasurer, made payable to the claimant or his order, bearing date from the time of and regularly numbered in the order of their issue, and he shall carefully keep proper warrant books, and when a warrant is issued the stub shall be carefully retained, upon which shall be recorded the number, date, name of payee, amount, nature of claims or services briefly stated and by whom allowed. He shall also retain all original bills and endorse thereupon claimant's name, nature of claim, the action had and if warrant be issued, dating and numbering said voucher or claims the same as the warrant. Nothing herein contained shall prevent claimants, at the time of issuing said warrants, from having the same broken, or issued in smaller warrants by the said auditor, using two or more warrants in lieu of one. In all such cases, however, when broken warrants are issued, the auditor issuing the same is required to preserve as many stub entries as he issues broken warrants, noting upon each stub for which issued, the same as in other cases, together with a note of the number of broken warrants which aggregate the amount of the entire claim allowed; provided, no single warrant shall be issued for a greater amount than five hundred dollars; provided, further, that the above restrictions shall not apply to warrants issued when there is cash on hand in the county treasury to pay the same on presentation. All claims of the county auditor against the county for services shall be audited and

allowed by the board of county commissioners as other claims are audited and allowed. Such warrants shall in all respects be audited, approved, issued, numbered, registered and paid the same as any other county warrant. The words "county warrant" as herein designated, shall be synonymous with "county order," or "county scrip." In this as well as all other laws of this state, such terms are convertible, and shall be considered to mean one and the same thing."

Sec. 3918 Rem. & Bal. Code.

"It shall be the duty of the county auditor, not earlier than ten days after the adjournment of the board of county commissioners, at any regular, adjourned or special term of said board, and not earlier than ten days after the receipt of any superior court cost bill, to make out a register of all warrants legally authorized and directed to be issued by such board of county commissioners or such cost bill and to make out under his hand and seal of office a certified copy of such register of warrants, and to forthwith deliver the same to the treasurer of the county, who shall record the same in a book to be kept by him for that purpose, and file and carefully preserve the original in his office for future reference. The register of warrants hereby authorized to be made by the county auditor shall be part of the records of such county and shall have all the force and effect of the same."

Sec. 3927 Rem. & Bal. Code.

"The auditor must, between the first and tenth of each month, examine the books of the treasurer, and see that the same have been correctly kept."

Sec. 3929 Rem. & Bal. Code.

"There shall be elected at each general election in each county in this state one county auditor, who shall have the qualification of an elector, and

who shall continue in office for the term of two years, and until his successor is elected and qualified; said county auditor shall be ex-officio clerk of the board of county commissioners, and recorder of deeds and other instruments in writing, which by law are to be recorded in and for the county for which he may be elected. The election of said officer shall be conducted and the returns made in the manner and form prescribed by the law regulating elections."

Sec. 3915 Rem. & Bal. Code.

"He shall keep an accurate account current with the treasurer of the county and shall charge him with all moneys received as shown by his receipts issued, and shall credit him with all disbursements on account of moneys paid out according to the record of the settlements of said treasurer with the board of county commissioners."

Sec. 3921 Rem. & Bal. Code.

"The board of county commissioners and county auditor must, at the January, April, July and October settlements with the county treasurer, count the money in the county treasury, and make and verify in duplicate statements showing:

1. The amount of money that ought to be in the treasury.

2. The amount and kind of money actually therein."

Sec. 3930 Rem. & Bal. Code.

Appellant contends that the county commissioners were liable to the county for its loss because they failed to examine the accounts of the treasurer, as provided in Sec. 3954, *supra.* It is perfectly plain, however, that an examination by the com-

missioners, at their quarterly sessions, of the books and vouchers of the treasurer, would not have disclosed any fraud or irregularities upon the part of the auditor.

Sec. 3954 only requires the board to examine the books and vouchers of the treasurer. That section provides exactly what books and vouchers shall be produced by the treasurer at that time. The bill alleges that such books and vouchers were duly produced, and even though the commissioners did fail to examine them, such failure would not create any liability against them in favor of the county, because such checking and comparing would not have uncovered the fraud or irregularities of the auditor.

Sec. 3954 says, "He (the treasurer) shall at such settlement, also present, together with such vouchers and claims for credits, a certified list of such vouchers and claims, arranged numerically, under the separate headings of the funds from which such vouchers have been paid, or on which such claims have accrued, or are made, which list must be checked, compared and made to correspond with the treasurer's books and vouchers by the board of county commissioners and the auditor at the time of such settlement."

The "vouchers" referred to mean the cancelled warrants in the treasurer's possession and which have been paid by him.

It is not claimed in the bill that the list of vouchers so presented, if properly checked and compared, would not correspond with the treasurer's books and vouchers; and it cannot be assumed in the absence of an averment that the vouchers and lists did not correspond with the treasurer's books and vouchers; and if they did so correspond, then no liability on the part of the commissioners was created, even though they did not make such comparison. The appellant must show by the bill that the county has been injured by reason of the failure of the county commissioners to comply with the statute, because if the county was not injured, or if it did not suffer loss by reason of such failure, then no cause of action would arise.

The only other claims of negligence against the county commissioners, as set out in Par. XI. of the bill, the same being with reference to the three hundred dollar ($300.00) liquor license.

Remington's Code, Sec. 6263, is as follows: "The board of county commissioners of each county in the state of Washington shall have the sole and exclusive authority and power to regulate, restrain, license, or prohibit the sale or disposal of spirituous,

fermented, malt, or other intoxicating liquors outside of the corporate limits of each incorporated city, incorporated town, or incorporated village in their respective counties; provided, that the annual license fee for the sale of spirituous, fermented, malt, or other intoxicating liquors shall, in no instance, be less than three hundred dollars or more than one thousand dollars, which said license fee shall be paid annualy in advance to the county treasurer, who shall pay ten per cent of the amount into the general fund of the state treasury, thirty-five per cent into the county school fund, and the remaining fifty-five per cent into the general county fund; provided, further, that no license shall be granted to sell spirituous, fermented, malt, or other intoxicating liquors by said county commissioners within one mile of the corporate limits of any incorporated city, town or village."

We presume under this section the procedure to secure a liquor license from the county would ordinarily be for the applicant to present his application to the county commissioners, who would thereupon order the auditor to issue the license, upon the production of the treasurer's receipt.

It is claimed by appellant that because the commissioners failed to detect the forgery on the liquor license receipt for 1902, that they therefore became liable to the county for the loss of the license fee, but we submit that the statute does not require the license fee to be paid to the treasurer before the commissioners order the license issued. The statute simply requires that the annual license

fee shall be payable in advance. The county commissioners, upon application being made, had authority to grant the license without the production of the treasurer's receipt. It had a right, upon the consideration of the application for the license, and in the absence of a receipt, to order the county auditor to issue the license upon the presentation to him, of a receipt showing that the money had been paid. The law does not impose upon the county commissioners the duty to examine any reecipt or see that any receipt is given. That is a matter to be looked after wholly by the auditor, who issues the liquor license.

The county commissioners, not having failed to comply with any law relating to the granting of liquor licenses, were not, therefore, liable to the county.

While on this liquor license question, we shall consider any liability of the treasurer to the county, arising out of his acts in connection therewith. It will be noticed that the treasurer has nothing whatever to do with the granting of liquor licenses except to receive the money and issue his receipt. It is not claimed that he failed in his duty. It would be absurd to say that the treasurer laid himself liable to the county for the fraud of the audi-

tor, merely because he (the treasurer) permitted a fellow county officer, to take from the treasurer's office the receipt which had been issued in the year 1902, without any knowledge whatever of the fraud that Blumberg, the auditor, intended to commit by virtue of having in his possession that receipt. It is not even shown that Blumberg, at the time the treasurer gave him the receipt, intended to commit a fraud. The treasurer certainly could not reasonably anticipate that the auditor intended so to do. There was no intention on the part of the treasurer to commit a fraud; no violation of his duty in permitting the auditor to take the receipt; no co-operation, wilful or otherwise, with the auditor with reference to that transaction; and nothing to put him upon notice that permitting the receipt to be taken would in any way enable the auditor to commit a fraud.

We refer again to Sec. 3927 *supra,* which requires the auditor " * * * * to make out a register of all warrants legally authorized and directed to be issued by the board of county commissioners * * * * and to make out under his hand and seal of office, a certified copy of such register of warrants, and to forthwith deliver the same to the treasurer of the county, who shall

record the same in a book to be kept by him for that purpose, and file and carefully preserve the same in his office *for further reference.* The register of warrants hereby authorized to be made by the county auditor shall be part of the records of such county and shall have all the force and effect of the same."

This statute was complied with. Sec. 3940 *supra* directs the treasurer to disburse county money "on the proper orders issued and attested by the county auditor." Orders, warrants and scrip by another section of the statute, mean the same thing.

All warrants paid by the treasurer were fair on their face and "issued and attested by the county auditor." No actual fraud on the part of the treasurer or commissioners is charged, no wilful neglect of duty, no guilty or intentional or knowing participation in the fraud of the auditor. It is plain that the treasurer, as well as the commissioners, were as much deceived by the auditor's fraud as anybody else. In fact, the fraud was practiced directly upon the treasurer. The treasurer followed the statute in paying the warrants. If he did, what claim has the county upon him for the fraud of the auditor?

The proximate cause of the county's loss was not what the treasurer did, but the fraud of the auditor, and such being the case, the county ought to be required to look to the auditor for reimbursement and to his surety, who stood sponsor for his fidelity. Certainly as between the auditor and treasurer the equities are all with the treasurer, and the surety ought to stand in the shoes of the auditor, so far as the treasurer is concerned. The auditor's bond (Sec. 958, Rem. Code) "shall be deemed a security to the................county................and also to all persons severally for the official delinquencies against which it is intended to provide." Thus the auditor's surety, and appellant, was bound to make good to the treasurer (as well as to the commissioners) any loss or liability suffered by them on account of the official misconduct of the auditor. The auditor's bond was taken to protect the county and all others against his misconduct. The claim of appellant is that the treasurer and commissioners are liable for the auditor's misconduct. If they are, then their sureties are, but would it be claimed that the sureties of the treasurer and commissioners would be made to respond for the county's loss of the money on the warrants in question?

On the question of the liability of the treasurer to the county, we cite

National Surety Co. vs. State Savings Bank, 156 Fed. (1907), page 21.

The facts in that case were that a deputy county auditor drew seven spurious warrants to fictitious payees, and sold them, with an assignment on the back of each of them, signed by him in the names of the myths to whom they were payable, to the State Savings Bank for their full face value, which was paid to him. The bank, after holding them for about a year, presented them to the county treasurer for payment, and received from him their full face value, with interest. Upon discovery of the fraud, the county brought suit against the auditor and his surety, on the auditor's bond, and recovered judgment which was paid by the surety. Thereupon, the surety, claiming subrogation, brought suit against the bank to recover its loss.

While holding the bank liable to the Surety Company, the court took occasions, on page 25, to say:

"The orders in question were apparently lawfully drawn, lawfully countersigned, and genuine. The natural and probable consequence of their issue was their presentation to the treasurer, to whom they were addressed, and payment of them by him. The statutes of the state made it his duty to pay authorized orders of that kind. The surety company was liable to the county, because the

presentation to the treasurer and the payment of the orders by him were the natural and probable consequence of their issue, and might have been reasonably anticipated by any prudent person. Right here is the radical and decisive difference between the position of the county and that of the bank. While the payment by the county was, in the ordinary course of business, reasonable and probable, the purchase of the orders by the bank on the assignments made in the names of myths by Bourne was not the natural or probable consequence of their issue. No one could have reasonably anticipated that a bank or any rational person would disregard the law which makes a non-negotiable chose in action in the hands of an assignee subject to every defense existing in favor of the maker against the assignor, purchase a non-negotiable order of the kind in question, and pay the purchase price thereof to one who was not the payee named therein, without inquiring into the genuineness of the assignment and the genuineness of its execution. Such a purchase would be out of the ordinary course of business, unnatural, improbable, incapable of anticipation, and in no legal sense the natural and probable consequence of the issue of the orders. For these reasons the purchase by the bank cannot be held to have so resulted from the "misconduct in office" of Bourne as to subject the surety company to liability to the bank for any loss it might have sustained by reason of its purchase."

In other words, it was not negligence for the treasurer to pay the warrants because the natural and probable consequence of their issue was their presentation to and payment by the county treasurer.

In this state, as in Minnesota, the statute (Sec. 3940, Rem. Code) "made it his (the treasurer's) duty to pay authorized orders of that kind."

The proximate cause of the county's loss was the fraud of the auditor. The treasurer, upon presentation of the warrants for payment, consulted the certified list of warrants filed with him by the auditor under Sec. 3927 *supra,* and found therefrom that the warrants presented conformed thereto. That was the very purpose for which this list was filed with him. Surely he was not required to look further than the public record filed with him for his guidance. He was not required to become a private detective and make outside inquiries as to the right of the auditor to present the wrarants and receive payment thereon. The fact of possession by the person who presented them, with their endorsements, we think, fully justified him in paying them, especially when they corresponded, as they did, with the certified list on file in his office.

It is not shown or alleged that the treasurer failed to account for all moneys that came into his possession as county treasurer, as required by Sec. 3952, Rem. & Bal. Code, which provides, "the county treasurer shall make complete settlement with the board of county commissioners, as required

by law, and shall at the expiration of his term of office, deliver to his successor all public moneys, books and papers in his possession."

It is submitted that the only person against whom the county had a claim on account of its losses, was the auditor and his surety, the appellant in this case. That the county is estopped and that it never had a right of action against Treasurer Welts is fully shown in the *Halloran* brief, to which reference is hereby made.

As to proposition (b) *supra,* it is submitted:

The appellant does and must rely wholly upon the doctrine of subrogation in its effort to hold these defendants liable. The doctrine of subrogation or substitution is an equitable doctrine wholly. It is not a fixed or inflexible rule of law or equity. It does not owe its origin to statute or custom. It is a creature of courts or equity, invented and applied by them to do justice, in a particular case, and under a particular state of facts, where the law is powerless in the premises.

> *Arlington State Bank vs. Paulsen,* (Neb.) 78 N. W. 303;
>
> *Pease vs. Egan,* (New York) 30 N. E. 102;
> *Acer vs. Hotchkiss,* 97 N. Y. 395.

No general rule can be laid down which will afford a test in all cases for the application of the doctrine of subrogation. Whether or not the doctrine is applicable in any particular case depends upon its particular facts and circumstances, the principle not being enforced as a matter of legal right, but in order to subserve the ends of justice in the particular controversy under consideration.

Boston Safe Deposit vs. Thomas, 53 Pac. 472;
Aultman, Miller & Co. vs. Bishop (Neb.), 74 N. W. 55;
Gordon vs. Stewart (Neb.), 96 N. W. 624;
In re Mosier (Pa.), 93 Am. Dec. 783.

Subrogation is not a universal remedy for all who have lost their money in paying obligations for which others are primarily bound.

Berry vs. Bullock (Miss.), 33 So. 410.

In *Enders vs. Bruhn* 4 Rand (Va.) it is said: "He who in administering it would stick to the letter, forgets the end of its creation, and perverts the spirit which gave it birth. It is a creature of equity, and real, essential justice is its object."

Hawker vs. Moore, 40 (W. Va.) 20 S. E. 848;
Schilb vs. Moon (W. Va.) 40 S. E. 329.

The doctrine cannot be invoked so as to work injustice, or defeat a legal right, or overthrow a

superior or perhaps even an equal equity, or displace an intervening right or title.

> *Makeel vs. Hotchkiss* (Ill.) 60 N. E. 524;
> *Bartholomew vs. First Natl. Bank* (Kan.) 47 Pac. 519;
> *Gray vs. Zelmer,* (Kan.) 72 Pac. 228;
> *Gaskill vs. Huffaker,* 49 S. W. 770;
> *Rand vs. Cutler* (Mass.) 29 N. E. 1085.

Many other cases might be cited on this proposition.

The doctrine of subrogation is frequently stated in about the following language:

"By payment of the debt, a surety has a right to be put in the place of the creditor, and to whatever means and remedy the creditor possesses to enforce payment from the principal, etc."

In the case of 55 Atl. 395, *supra,* a Maryland case, there is a quotation from 51 Maryland Rep., page 34, as follows:

"In *Orem vs. Wrightson,* 51 Md. 34, 34 Am. Rep. 286, the court says of the doctrine of subrogation: 'It is not founded on contract, but has its origin in a sense of natural justice. So soon as a surety pays the debt of the principal debtor, equity subrogates him to the place of the creditor and gives him every right, lien and security to which the creditor could have resorted for the payment of his debt.' In *Ghiselin vs. Fergusson,* 4 Har. & J. 522, it is said that if a surety paying

the debt of his principal shall be considered to stand in place of the creditor for any one purpose to answer the ends of justice the court cannot understand why he may not be so considered for every purpose where the same ends are in view.' "

Such statement was not necessary to the decision of the case in the 55 Atl. 395 *supra,* because in that case, as in the case in 156 Fed. 21, *supra,* the surety sought to recover from a bank which, *with knowledge* that the city owned the money, paid interest thereon to the public official who had the custody of it. The bank participated in the fraud, with guilty knowledge; it had paid the city's money to one whom it knew was not entitled to it. The bank received the benefit and in equity ought to respond to the city or to the surety who was subrogated to its rights.

In the case at bar, neither the treasurer nor commissioners received the slightest benefit; they received no profit or advantage; they acted honestly, and nothing they did proximately caused the loss to the county. Why, in equity should the surety of the auditor, whose fraud was the proximate, direct and sole cause of the county's loss, recoup its loss from innocent persons, especially when the bond of the surety was given for the protection of the treasurer and commissioners against the misconduct of the auditor?

The appellant in effect says to the defendants: "Yes, our bond was to protect you against the official misconduct of the auditor, but now we want you to pay us our loss on account of that very misconduct against which we guaranteed you."

To entitle one to subrogation his equity must be strong and his case clear.

> *Forest Oil Co.'s Appeal,* 118 Pa. 138; 4 Am. St. Rep. 584; 12 Atl. 442;
>
> *Nesbit vs. Martin,* 4 Pa. Co. Ct. 95.

The general statement as quoted *supra* from 55 Atl. must be considered with the well established rule stated above, that no general rule can be laid down which will afford a test in all cases for its application. Each case, as shown by citations above, stands on its own facts and circumstances as to whether subrogation will be applied.

Neither the case from 55 Atl. 395 nor the one from 156 Fed. 21, establish the rule against the defendants. The facts were entirely different. We ask the court to read those cases together with the dissenting opinion in the Federal case.

No such participation by the defendants in the fraud of the auditor is shown to justify the application of the doctrine of subrogation in the case at bar. On the contrary, if the county recovered

from the defendants, they might hold the appellant therefor, in which case it is plain the appellant has no right of recovery from defendants.

It is urged by appellant that it was the duty of the commissioners to make certain examinations of the accounts of the treasurer and auditor, and their failure in that regard made them participate in the fraud of the auditor.

That duty, however, in any event, was a duty they owed the *public,* and not the surety company, and therefore the surety company has no right to complain of its non-performance.

> *Williams vs. Lyman,* 88 Fed. 237;
>
> *Mayor, Etc. vs. Stout,* 18 Atl. 943 *et seq.;*
>
> *Hudson vs. McArthur,* 28 L. R. A. (N. S.) 115 and note;
>
> *Held vs. Bagwell,* 12 N. W. 226;
>
> *Independent School Dist. vs. Hubbard,* 81 N. W. 241, p. 242.

The facts in the case of *Held vs. Bagwell* (Iowa), *supra,* were these: One Jones had been county treasurer for the term ending the first Monday in January, 1876, and was elected for the succeeding term. It was the duty of the county board of supervisors to approve the bond of the treasurer and to require him to produce and fully

account for all the money and property in his control, under color of his office, during the expired term, and the said board and the members thereof were prohibited by law from approving the bond of the treasurer until he had produced and fully accounted with said board for all such funds and property, and the law required such board to endorse upon the bond the fact that such accounting had been made, etc. The board failed to require such accounting from the treasurer and failed to make such endorsement, but in violation of law approved the bond of the second term, by reason of which the plaintiff, who was surety on the second bond, became liable as surety for Jones' defalcations made during his first term. Suit was brought by the county against the surety and judgment rendered against him for $15,000 and costs, a part of which plaintiff paid. Thereafter, the plaintiff brought suit against one of the supervisors to recover the amount paid, alleging the facts above set out, and further setting forth facts showing that at the time of such approval the defendant knew of such defalcations and not only negligently but fraudulently concealed such facts from the plaintiff.

Defendant demurred to the complaint and the Supreme Court sustains it, using the following language:

"2. The demurrer, we think, was correctly sustained for the following reasons: The defendant, as a public officer, was charged with the duty of approving the bond of the treasurer. This was a duty to be discharged for the benefit of the public. He was required, in approving the bond, to act for the interest of the community, to the end that the public money of the county would be secured to its treasury. He was not required to look after the interest of the sureties upon the bond, or to protect them from liability which they might incur by signing the bond of an unfaithful public officer. If the defendant approved the bond when the treasurer was in default, he violated his duty to the public. The plaintiff has no remedy against the defendant for losses sustained by reason of this violation of public duty, for the reason he violated no duty he owed to the plaintiff. See Cooley, Torts, 379. The allegations that defendant's act in approving the bond was done 'wilfully' and 'maliciously' and 'to oppress' plaintiff, do not 'show that it was done in the violation of a duty owed by defendant to plaintiff.' In the absence of such an allegation the plaintiff's petition fails to present a cause of action against defendant."

While the complaint in the last cited case is in fewer words than in the case at bar, yet it was there attempted to accomplish the same result, in the same way, as in the case at bar. Such attempt failed on the grounds stated.

The case of *Hudson vs. Arthur, supra* (North Carolina), was decided May 4, 1910, and is the latest one we are able to find. It holds:

"1. Failure of County Commissioners to effect a proper settlement with a tax collector, and require

him to exhibit the necessary receipts for one term before entering upon the duties of a succeeding one, is not the cause of injury to persons signing his bond for the succeeding term, through losses occasioned by his embezzlement during such term and afterwards, so as to give the sureties a cause of action against the commissioners for their negligence.

"2. The failure of county commissioners to effect a settlement with the tax collector, and require him to exhibit the necessary receipts for one year before placing the duplicates of the next year in his hands, as required under penalty by statute, does not render them liable to the sureties on his bond, who are compelled to make good money which he collects and fails to account for under the new duplicates."

There, as in the case at bar, it was urged that the statute was mandatory and the loss to plaintiff was directly and proximately caused by the failure of the county commissioners to perform their ministerial statutory duty. In this connection the court says:

"If we concede the mandatory character of the statutes, and the ministerial character of the acts to be done by the commissioners, involving the exercise of no discretion, we do not think the injury to plaintiffs complained of necessarily or by direct connection follows."

The court then proceeds to show that the duty imposed by the statute is one due to the public only and cannot inure to the benefit of a surety, saying:

"The protection of the plaintiffs, as sureties upon the sheriff's bond, is clearly not within the purview of the statutes; the taking of a bond with approved security was itself to further assure the public. To make good the default of the sheriff was the express obligation of the bond signed by the plaintiffs; it was the guaranty of his fidelity and honesty."

And further:

"In addition, we do not think the injury suffered by the plaintiffs, and the loss sustained by them, was the necessary, direct or immediate result of the defendants' acts; they do not stand in the relation of cause and effect. * * * The direct and immediate and only cause of the loss sustained by the plaintiffs was the dishonesty and embezzlement of the sheriff, their principal, whose honesty and fidelity was the express obligation of their undertakings."

Many cases are cited.

Neither did the treasurer owe to appellant any duty with respect to payment of warrants or with respect to liquor license receipts. His duties were public duties only and the appellant has no greater claim against him than against the commissioners.

"To discharge a surety from his obligation, there must be some *positive* act done by the plaintiff (the obligee) to the prejudice of the surety, such as the surrender of a security or giving the principal time by a valid and binding agreement, or such a degree of negligence as to imply connivance amounting to fraud."

Mayor vs. Stout, supra, 18 Atl. at p. 947, and cases cited to same effect, 88 Fed. at p. 241.

If such *positive* acts are necessary to relieve a surety, certainly the law requires the same *positive* acts to enable him to recover on the ground of subrogation.

The auditor (for whose integrity the surety company stood sponsor), by forgery and other fraudulent acts and misrepresentations, defrauded the county. Now the surety company says in effect that, as the loss which it paid resulted from the alleged *carelessness* of the defendants, coupled with the *fraud* of the auditor, *equity* ought to place the whole burden on those whose fault was the least.

If the bonding company may recover against the treasurer and county commissioners it may also, for the same reasons, recover on the official bonds of the treasurer and county commissioners. That was never intended by the law. If the bonding company was subrogated to the right of the county to recover from the treasurer and county commissioners, then it was subrogated to the county's right of recovery from the bondsmen of the treasurer and commissioners. This would necessarily result in the sureties on the bonds of the treasurer and

county commissioners, being also sureties for the fidelity of the auditor, which was never intended.

The authorities disclose that before subrogation can take place there must be a primary and secondary liability. The primary liability must arise against the principal debtor in favor of the principal creditor, and the right of the subrogee to subrogation must rest on the secondary liability for the same obligation. The right of subrogation does not necessarily rest on contract, but the two elements above mentioned must exist in each case no matter what the conditions are out of which the right of subrogation arises.

Fuller vs. Davis Sons, 56 N. E. 791;

Boston Safety Deposit & Trust Co. vs. Thomas, 53 P. 472;

In re Martin, 54 Atl. 589;

Lawrence vs. United States, 71 Fed. 228;

Mansfield vs. City of New York, 58 N. E. 889;

Burrus vs. Cook, 114 S. W. 1065;

White River School Twp. vs. Dorrell, 59 N. E. 867.

The application of these principals on the relation established between Skagit County, Blumberg and the surety company is not difficult, but as the

surety company does not occupy the position of surety and is not secondarily liable for any default or breach of trust on the part of the treasurer or board of county commissioners, one of the essential elements under the authorities is wanting in the case at bar to bring it within the law of subrogation, as announced by the above authorities.

The arguments presented in the above brief and in the *Halloran* brief apply equally to the case against Commissioners Henson, Moody and Dunlap, whose term of office as such commissioners expired at the same time Welts' term of office expired.

It is respectfully submitted that the judgment of the lower court should be affirmed.

C. H. FARRELL,
J. H. KANE,
W. B. STRATTON,
Solicitors for Appellees Welts, Bessner, Henson and Henry,
734 Central Building, Seattle.
E. C. MILLION,
J. P. HOUSER,
Solicitors for Appellees Henson, Moody and Dunlap,
920 Alaska Building, Seattle.

C. H. Hanford

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AMERICAN BONDING COMPANY, of Baltimore Maryland, *Appellant,* vs. R. O. WELTS, NICK BESSNER, GEO. A. HENSON and W. J. HENRY, *Appellees.*	1989
AMERICAN BONDING COMPANY, of Baltimore, Maryland, *Appellant,* vs. PATRICK HALLORAN, GEO. A. HENSON, R. M. MOODY and JAMES DUNLAP, *Appellees.*	1990
AMERICAN BONDING COMPANY, of Baltimore, Maryland, *Appellant,* vs. GEO. A. HENSON, R. M. MOODY and JAMES DUNLAP, *Appellees.*	1991

CONSOLIDATED CAUSES.

On Appeal From the United States Circuit Court for the Western District of Washington, Northern Division.

HON. C. H. HANFORD, District Judge.

APPELLANT'S REPLY BRIEF

F. S. BLATTNER,
L. B. da PONTE,
Solicitors for Appellant.

PRESS OF PUYALLUP VALLEY TRIBUNE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AMERICAN BONDING COMPANY, of Baltimore Maryland,

Appellant,

vs.

R. O. WELTS, NICK BESSNER, GEO. A. HENSON and W. J. HENRY,

Appellees.

AMERICAN BONDING COMPANY, of Baltimore, Maryland,

Appellant,

vs.

PATRICK HALLORAN, GEO. A. HENSON, R. M. MOODY and JAMES DUNLAP,

Appellees.

AMERICAN BONDING COMPANY, of Baltimore, Maryland,

Appellant,

vs.

GEO. A. HENSON, R. M. MOODY and JAMES DUNLAP,

Appellees.

CONSOLIDATED CAUSES.

On Appeal From the United States Circuit Court for the Western District of Washington, Northern Division.
HON. C. H. HANFORD, District Judge.

APPELLANT'S REPLY BRIEF

ADDITIONAL AUTHORITIES.

That appellant is subrogated to the cause of action belonging to Skagit County, see the following late case:

U. S. F. & G. Co. vs. Adoue, 137 S. W. 648.

That the defendant commissioners were the proper parties to have caused an action to be commenced against Blumberg to cause his removal from office, see:

Prentice vs. Franklin County, 54 W. 587.

Replying first to the brief submitted by Messrs. Farrell, Kane & Stratton and Million & Hauser, solicitors for Welts, Bessner, Henson and Henry and Henson, Moody and Dunlap, respectively.

Aside from the question of the statute of limitations more fully argued in the brief submitted by Messrs. Dorr & Hadley in behalf of appellee, Patrick Halloran, appellees above named submit first that "the county never did have any right of action against the treasurer or commissioners."

We do not find anything in the brief on this point that requires a reply. Our original briefs fully discuss this proposition, and we submit it is too clear for argument that these appellees became liable to Skagit County on both grounds specified, viz.: first, because of their negligence in the performance and failure to perform their statutory duties prescribed for no other purpose than to prevent and detect the very frauds committed by the auditor; and, second, on account of their breach and disregard of the terms of their respective oaths and bonds whereby they became liable to the county independently of their alleged negligence and official misconduct. The latter ground of liability is not even questioned in their brief.

In connection with this point appellees refer to R. &B. Code, Sec. 958, providing that the auditor's bond shall be deemed a security to the county and also to all persons severally for the official delinquencies against which it is intended to provide. From this it is argued that appellees would have a cause of action against appellant had they been held liable to the county on account of Blumberg's defalcation. This is a novel application of a stattue passed in the interest of third persons, members of the public generally who might be injured by the official dereliction of the auditor. It would be an anomalous condition in the law if it be held that a joint tort feasor has a cause of action on the bond of his joint wrong doer to recover indemnity from an innocent party for the very loss to which his own misconduct and official dereliction directly contributed as a proximate cause thereof. This statute was passed to afford a remedy to innocent parties injured by official misconduct, and not to protect other officials from the consequence of their *own misconduct.* So far from conferring an action on appellees under the circumstances, there is direct statutory authority for appellant's action in R. & B. Code, Sec. 8326, which will be more particularly noted at another place.

Secondly, appellees submit that "even if the county did have a cause of action against the treasurer and commissioners, yet appellant was not subrogated to that right."

That appellant was subrogated is established by

all authority, and many adjudged cases and text writers are cited in the original briefs, and at this place it is only necessary to notice one of appellees' incidental contentions.

They say that the duty breached by appellees was a duty owed only to the public, and therefore appellant cannot complain of its non-performance.

Conceding that the duties breached were of a judicial or discretionary nature, and not merely ministerial, the reply is that we are here asserting the county's cause of action under the equitable doctrine of subrogation, and consequently the contention noticed is inapplicable.

But there is a further reply involving a direct negation of the proposition advanced by appellees. It may be thus stated:

The duties breached were purely ministerial, involving the exercise of no discretion, and consequently any party having a ninterest in their performance may maintain an action to recover damages in consequence of their breach.

It is admitted that officials are not liable for negligence or misconduct in the performance of judicial or discretionary functions. (29 Cyc. 1443.) But that for negligence or dereliction in the performance of merely ministerial duties they are liable to third persons injured thereby is established by all authority. (29 Cyc. 1442.) The only difficulty is in de-

termining in all cases what duties are ministerial and what discretionary, but a test is stated by the Supreme Court in the following language:

> "The rule is well settled, that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect. A mistake as to his duty and honest intentions will not excuse the offender."

Amy vs. Barkholder, 11 Wall. 136, 20 L. Ed. 101.

In this case defendant commissioners neglected to levy a tax to pay off plaintiff's judgment, as it was their duty to do, and they were held individually liable to the judgment creditor, and the fact that the state courts had issued an injunction restraining the levy of the tax was held no excuse.

The duties disregarded by appellees were merely ministerial or clerical. The duty to audit accounts is purely clerical, as is the duty of the treasurer to pay warrants when presented, and consequently for their failure to perform, or negligence in performance thereof to the injury of appellant, an action against them may be maintained directly as for a breach of a duty owed to appellant direct, indepen-

dently of appellant's right of subrogation to the county's causes of action.

But the doctrine contended for by appellees has been abrogated in this state.

R. & B. Code, Sec. 8326, is as follows:

> "Every official bond executed by any officer pursuant to law shall be in form and obligatory upon the principal and sureties therein to and for the State of Washington, and to and for the use and benefit of all persons who may be injured or aggrieved by the wrongful act or default of such officer in his official capacity, and any person so injured or aggrieved may bring suit on such bond in his or her own name without an assignment thereof." (Laws 1890, page 34.)

This statute was passed to repeal the general rule of law that officials were not personally liable for defaults in the performance of their discretionary duties. The effect of the statute is to impose a liability upon officials for their wrongful acts or defaults in the performance of their official duties in favor of "any person" injured thereby. This language is certainly broad enough to include appellant. This contention is recognized in *Hudson vs. McArthur*, cited by appellees. After using the language quoted by appellees to the effect that the duties breached were imposed for the public protection, and not for the beenfit of sureties on the bond of a

fellow official, the Court uses the following language, viz.:

> "The legislature has not yet deemed it wise or proper to impose the additional liability upon the commissioners contended for by plaintiffs, and, in the absence of express statutory enactment, or of some well settled principle of law constraining us to so hold, we do not think the commissioners are liable to plaintiffs."

The Court thus recognizes the contention that if the appropriate statute exist it must be observed, and we submit that the statute above quoted supplies what is needed, if anything, to impose on appellees undoubted liability to appellant for the consequences of their official dereliction.

Appellees rely on *Hudson vs. McArthur*, 68 S. E. 995. Aside from the fact that the rule there announced has been repealed by R. & B. Code, Sec. 8326, supra, the majority opinion is not the law. The dissenting opinion lays down the true rule. The majority opinion expressly repudiates *Raynsford vs. Phelps*, 5 N. W. 403, an opinion by Judge Cooley, and follows an Indiana case. The minority opinion follows *Raynsford vs. Phelps* and cases cited, and is in harmony with the decisions of the Supreme Court in *Amy vs. Barkhouser*, 11 Wall. 136, which latter case serves for the authority for the decision in *Raynsford vs. Phelps*. In the Phelps case a tax col-

lector falsely returned that there was no personal property upon certain land, whereby the personal property tax became a lien on the land, and a mortgagee was obliged to redeem from a tax sale. In an action by the mortgagee against the tax collector for making a false return it was contended that the defendant's duty was only to the public and no action lay in favor of an individual injured thereby. But it was held that the plaintiff should recover, as the duties violated were only ministerial. The reasoning of this case is in point.

We submit, therefore, that appellees are mistaken in stating in their briefs that appellant does and must rely wholly on the principle of subrogation to sustain these actions, and that there is a direct liability from appellees to appellant growing out of the violation of duties owed directly to appellant and upon the faith of the performance of which it is averred appellant executed the auditor's bond. It is manifest that the performance of these duties by appellees would have inured to the benefit and protection of appellant as a surety on the auditor's bond, and it is just and equitable that appellees should indemnify appellant from the consequences of their total neglect of the same.

Amy vs. Supervisors, 11 Wall. 136, 20 L. Ed. 101.

Raynsford vs. Phelps, 5 N. W. 403.

One other contention we desire to notice is thus stated by appellees:

"The claim of appellant is that the treasurer and commissioners are liable for the auditor's misconduct. If they are, then their sureties are, but would it be claimed that the sureties of the treasurer and commissioners would be made to respond for the county's loss of money on the warrants in question?"

The reply is that we claim the appellees are liable for their own official dereliction, not for the auditor's. Had they not been guilty of negligence and official dereliction proximately contributing to the loss, as held in the *Ramsey County* cases, of course they would not be liable.

As to the liability of the sureties of the appellees, of course they were liable to the county to the same extent as were appellees, but we do not claim they would be liable to appellant simply because they are equally as innocent of participation in the misconduct that occasioned the loss as is appellant, and as between parties equally innocent and free from blame equity will leave them as it finds them. Had the appellees and their sureties been sued by the county and had the sureties paid the loss they could not have recovered against appellant, but only against the auditor. Similarly, appellant cannot recover against the sureties, but can recover against the appellees, as they participated in the breach of trust as joint wrong doers. Neither the equitable principle of subrogation nor R. & B. Code, Sec. 8326, operates to confer a cause of action in

favor of an innocent party against another party in all respects as innocent, but only confers the cause of action on an innocent party against the guilty official who has caused or participated in causing the loss.

The brief submitted by appellee, Halloran, is along the same lines as the brief of the other appellees, and does not require special notice. What has been said answers this brief as well as the other, but one or two different authorities are cited which we will notice.

Harrison vs. Logan County, 110 S. W. 377.

This case is cited upon the proposition that the treasurers were not liable to the county. The case is not in point because the treasurer was treated as a merely ministerial officer who was bound to pay out money on the orders of his superior officers, the fiscal court. The court having directed the treasurer to pay the money he was obliged to comply, and was properly protected. But in the instant cases it appears that the treasurer was not acting by authority of the commissioners. On the contrary, he paid the warrants wholly without authority of the commissioners, or any other lawful authority, and upon the endorsement of an unauthorized party, wholly without inquiry, and under circumstances that convict him of gross negligence under the rules pertaining to all commercial transactions and the usages of every-day business life. The *Ramsey County* cases

are directly in point, and the *Logan County* case is not in the least in point.

Wilson vs. Wall, 6 Wall. 83, cited on page 34 of Halloran's brief, is authority against appellee's contentions. That case unequivocally holds that the means of knowledge, coupled with the duty to know, is equivalent to actual knowledge, and one thus situated must be treated as if he had actual knowledge.

Upon the question of limitation, we submit in candor that appellees have made no serious attempt to answer appellant's contentions. The case of *Burrus vs. Cook*, and authorities there cited, is not even referred to by appellee, Halloran, and only mentioned to claim it is not in point by the other appellees. But appellees have had a remarkable change of heart concerning this case since we cited the Supreme Court decision reversing the majority opinion of the lower Court. At the argument in the Court below, learned counsel for appellees cited the opinion of the Missouri Court of Appeals and declared it was directly in point, and we were forced by candor to concede that it is, at that time not being advised of its reversal, but when we later followed it up and found it had been reversed by the Supreme Court of Missouri appellee asserts with equal earnestness that the case is not in point. We prefer, for our part, to accept learned counsel's first opinion of the case, and submit that *Burrus vs. Cook*, and the reasoning on which it is based is directly in point. The proposition fully discussed in the minority opinion and affirmed by the

Supreme Court is the general one, viz., has a subrogee the period in which to assert the claim with respect to which he claims subrogation that the creditor had? or has he only such time, be it longer or shorter, as is allowed by law for asserting his own claim, dating from date of payment by him? The Court holds that he has the time allowed by law for asserting his own claim, dating from date of payment, and when his claim is barred by its own period his action is barred, although had the original creditor been maintaining the action it would not be barred. The period applicable to the creditor's action is not the period applicable to the subrogee's action. It is therefore wholly immaterial whether the county's action is barred or not. Appellant had three years dating from date of payment to bring this action as the subrogee of Skagit County, and it is immaterial that at date of commencement of the same the county's action was barred. *Burrus vs. Cook* is the only case to be found in which the limitation period applicable to the right of subrogation has been thoroughly considered and the reasons and principles upon which the right to subrogation is based has been thoroughly analyzed and stated. The cases cited by appellees, such as *Childs vs. Smith* and the other cases, if in point at all, are not entitled to very great consideration because they are nothing more than dogmatic pronunciamentos, supported neither by adjudged cases nor recommended and enforced by sound reasoning, or for that matter, any reasoning at all. It seems to us that when the real nature of subrogation

is considered there is no room for difference of opinion on this point. If subrogation is the means taken by equity to place a loss where equity demands it should lie—if it arises out of a natural equity that the party causing a loss should bear it rather than an innocent party, how can limitation commence to run against an innocent party's right until the event has occurred on which his right is based? As pointed out in *Burrus vs. Cook*, subrogation is not an absolute right. Neither is it a substantive right in the strict sense, but is merely a means of doing justice in a given case. In other words, subrogation is a *remedy*, and like other equitable remedies must be invoked without laches, or it will be lost. Appellant's *substantive right* in these cases, using the term in its technical sense, is the right to indemnity arising out of the natural equity that the guilty shall protect the innocent from the consequences of the former's dereliction, and subrogation is the *means* or *remedy* afforded by equity to accomplish this purpose. It is therefore absurd to contend that the limitation will run against the remedy before the remedy exists. Rights and remedies are co-existent. There is no right without a remedy for its violation. When we say there is no right we really mean that there is no remedy, or, as often expressed, "*damnum absque injuria.*" It therefore follows that if appellees' contention is correct that limitation has barred the remedy before the right accrued it is only another way of saying that there is no right to subrogation under the facts of this case. That appellant is entitled to

invoke the remedy afforded by the equitable principle of subrogation is established by all authority—text writers and adjudged cases, and is hardly denied by appellees. Viewing the matter from appellees' standpoint, the same conclusion is inevitable. Appellees are invoking the statute to protect them from a cause of action which did not exist. How could the statute run in their favor on a demand for which they were not liable? There is no precedent or analogy in the law in support of the contention that the statute was running in appellees' favor during the interval between the discovery of the auditor's defalcation and payment of the judgments by appellant. The statute can no more run in favor of a party not subject to suit than against a party who has no cause of action. Statutes of limitation must have something to operate upon. To say that the statute runs against a right which has no existence is a manifest absurdity. Yet that is what appellees' contention amounts to.

What has been said as to the statute is from the standpoint of subrogation to the county's rights. Viewing the case from the standpoint of a direct cause of action in appellant's favor under *Amy vs. Supervisors* and *Raynsford vs. Phelps*, supra, there is no room to contend that the statute has run. *Powers vs. Munger* is directly in point and was cited in support of this view of the case.

We submit in conclusion that appellant could not do otherwise than it did in this matter. It could not

pay the county's demands without the judgment of the highest Sate Court because had it done so it would now be confronted with the contention that in so doing it was a mere volunteer paying an obligation for which it was not liable, or at least liable only as to part. Neither could appellees have been made parties to the Skagit County cases. The county could have objected to appellant and appellees trying out their differences in its case. Moreover, being joint tort feasors, the county could sue Blumberg and his surety alone, or appellees and their sureties alone, or all together, at the county's option, and the parties chosen could not require other parties to be brought in.

We submit that the judgments appealed from should be reversed.

Respectfully submitted,

F. S. BLATTNER,
L. B. da PONTE,

Attorneys for Appellant, American Bonding Company.